FILE COPY

FILED
FEB 5
CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. [redacted] 15

IOWA-DES MOINES NATIONAL BANK,
PETITIONER,

v.

J. M. STEWART ET AL., RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA AND BRIEF IN SUPPORT THEREOF.

J. G. GAMBLE,
A. B. HOWLAND,
Counsel for Petitioner.

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
Summary statement of the matter involved	1
Reasons relied upon for the allowance of the writ	21
Specification of errors	24
Prayer for writ	27
Brief in support of petition for writ of certiorari	29
I. The opinion of the court below	29
II. Jurisdiction	30
III. Statement of the case	31
IV. Specification of errors	31
V. Argument	31
Summary of argument	31

The decision below is of rights arising under the Fourteenth Amendment to the Constitution of the United States and Section 5219 of the Revised Statutes of the United States, and is contrary to and in conflict with prior decisions of this court, and of final decisions of other Federal courts.

The decision below denied a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion, and is in itself a contravention of the Fourteenth Amendment.

The decision below is of substantial Federal questions and is based upon untenable conclusions of general law, and is in conflict with the weight of authority.

Table of Cases Cited.

Avoca State Bank v. Burke, County Auditor, 193 Iowa, 1055	36, 43
Carpenter v. Shaw, 280 U. S., 363	22, 31, 45
Chicago & Northwestern Ry. Co. v. Osborne, 265 U. S., 14	37, 47
Commercial National Bank v. Board of Supervisors, 168 Iowa, 501	46
Cummings v. Merchants National Bank of Toledo, 101 U. S., 153	22, 30, 48
Des Moines National Bank v. Fairweather, 191 Iowa, 1244	55

Page

First National Bank of Guthrie Center v. Anderson, 269 U. S., 341 32
First National Bank of Remsen v. Hayes, County Auditor, 186 Iowa, 892 ..... 35, 43
First National Bank of Hartford v. City of Hartford, 273 U. S., 548 ..... 22, 30, 37, 38, 48
First National Bank v. City of Council Bluffs, 182 Iowa, 107 56
First National Bank of Estherville v. City Council, 150 Iowa, 95 57
Green v. L. & I. Ry. Co., 244 U. S., 499 ..... 30, 47, 52
Home Savings Bank v. Des Moines, 205 U. S., 503 57
Merchants National Bank of Richmond v. Richmond, 256 U. S., 635 ..... 37, 38
Minnesota v. First National Bank of St. Paul, 273 U. S., 561. 22, 30, 38
Montana National Bank v. Yellowstone County, 276 U. S., 497 ..... 23, 31, 45
Munn, County Treasurer, v. Des Moines National Bank, 18 Fed. (2d), 269 ..... 23, 37, 38, 51
Murphy v. Berry, 200 Iowa, 974 46
Northwestern Bank of Ireton v. Van Roekel, 202 Iowa 237 42
Raymond v. Chicago Union Traction Company, 207 U. S., 20 ..... 47, 48
Reagan v. Farmers Loan & Trust Co., 154 U. S., 362... 22, 31, 37, 38
Security Savings Bank v. Board of Review, 189 Iowa, 463 36
Sioux City Bridge Company v. Dakota County, 260 U. S., 441 ..... 37, 47, 48, 51
Sunday Lake Iron Company v. Wakefield, 247 U. S., 350 47
Taylor v. L. & N. Ry. Co., 88 Fed., 350 40
Ward v. Love County, 253 U. S., 17 ..... 23, 31, 52

TABLE OF STATUTES CITED.

Judicial Code, Section 237a 30
Revised Statutes of the United States, Section 5219 ..... 2, 3, 5
Code of Iowa, 1897, Section 1387 ..... 40, 62
1390 ..... 40, 62
1396-7 ..... 41, 62
1417 ..... 45, 63
Code of Iowa, Supplement, 1913, Section 1072 39
1310 ..... 33, 37, 58
1322 ..... 33, 59, 60
1322-1a 7, 33
1383 ..... 40, 61
1385-b 40, 61
Laws 37th Iowa General Assembly, Chapter 343 ..... 40, 64

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No.

IOWA-DES MOINES NATIONAL BANK,
PETITIONER,

v.

J. M. STEWART ET AL., RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Supreme Court of the United States:

The petitioner, the Iowa-Des Moines National Bank, respectfully shows to this Honorable Court:

Summary Statement of the Matter Involved.

The petitioner, a national bank organized and existing under the laws of the United States relating to national banking associations, and at all times herein referred to engaged in the business of banking in the

City of Des Moines, Polk County, Iowa (the name of the petitioner having been amended since the institution of the action), brought this action in mandamus in the District Court of Polk County, Iowa, seeking a writ directing the respondents, in their respective capacities as members of the board of supervisors and county auditor and county treasurer of said county (proper substitution of successors in office during the pendency of the action having been made), to refund to petitioner certain taxes and penalties thereon erroneously and illegally exacted of the petitioner by said respondents, and by the taxing officers of said county in the years 1919 to 1922, inclusive. The proceeding is one authorized by the statutes of Iowa in force at the time and now included in the Code of 1927 as Section 7235.

The basis of the action was:

First, that the shares of stock of petitioner were subjected to taxation in the years referred to at rates from five to seven times greater than were the taxes imposed upon other moneyed capital in the hands of individual citizens in the same taxing district in the State of Iowa for the same taxing years, thus violating the provisions of Section 5219 of the Revised Statutes of the United States.

Second, that the taxing officials of the State of Iowa, County of Polk and City of Des Moines, intentionally, habitually, systematically, and arbitrarily in each of the years 1919 to 1922, inclusive, imposed taxes upon large amounts of moneyed capital employed in com-

petition with the petitioner at rates grossly discriminatory, as compared with the rates and taxes imposed upon the shares of stock of petitioner, thereby not only infringing the provisions of Section 5219 of the Revised Statutes of the United States, but as well the provisions of the Fourteenth Amendment to the Constitution of the United States, which provides that no state shall deny to any person within its jurisdiction the equal protection of the law.

Third, that by the statutes of the State of Iowa it was expressly provided that shares of stock of national, state, and savings banks and trust companies, and other moneyed capital within the meaning of Section 5219 of the Revised Statutes of the United States, should be subjected to taxation at a rate equaling the consolidated levy compiled under the laws of Iowa after a determination of the needs of each taxing district of the state, applied to one-fifth (1/5) of the actual valuation of such shares of stock. Such statutes also expressly provided that moneys and credits, not including shares of stock in national, state, and savings banks and trust companies, and other moneyed capital within the meaning of Section 5219 of the Revised Statutes of the United States, should be taxed at a rate of five mills on the dollar of actual valuation, but notwithstanding the provisions of the said statutes of the state, the taxing officials charged with the administration of such laws or some of them, habitually, intentionally, systematically, and arbitrarily subjected the shares of stock of petitioner to taxation at such rate equaling the said consolidated levy in each of the

years 1919 to 1922, inclusive, but subjected large amounts of other moneyed capital within the meaning of Section 5219 of the Revised Statutes of the United States to taxes at said five mills upon the dollar of actual valuation, thereby subjecting the shares of stock of petitioner to taxation in said years at a rate from five to seven times that imposed upon such other moneyed capital.

That the county treasurer of Polk County, Iowa, the collecting agent of taxes for the State of Iowa and all of its political subdivisions, demanded of the petitioner that it pay taxes upon its shares at the said consolidated levy rate, together with interest and penalties thereon, and threatened to enforce collection of said taxes, interest, and penalties by seizure and sale of plaintiff's property; that in order to prevent the sale of its property and the accumulation of penalties, the petitioner, on November 30, 1923, under written protest, paid to the said treasurer the following amounts, to wit:

Year.	For taxes.	For penalties.
1919	$55,807.62	$25,113.43
1920	64,053.64	24,340.38
1921	67,751.68	17,615.44
1922	61,341.68	4,907.33

Fourth, that in a suit instituted in the United States District Court for the Southern District of Iowa by the Des Moines National Bank, a corporation organized under the national banking laws of the United States, against the county treasurer of Polk County, Iowa, a judgment and decree was rendered enjoining the collection of taxes against the shares of stock of said

Des Moines National Bank at a greater rate than five mills on the dollar of actual valuation for the years 1919 to 1922, inclusive, on account of the unconstitutional administration of the statutes of the State of Iowa by the taxing officers of the City of Des Moines and of Polk County, Iowa, and because of the violation of the restrictions upon the power to tax the shares of stock of the said Des Moines National Bank in said years, contained in Section 5219 of the Revised Statutes of the United States. That the said county treasurer appealed from said judgment and decree, and the board of supervisors and the State of Iowa, by the Attorney General, and the City of Des Moines, by its corporation counsel, all appeared in said cause upon its trial in the district court, and in the appeal therefrom to the Circuit Court of Appeals of the United States for the Eighth Circuit, and participated in the presentation of the defense to said action, and bore a part of the expense of such defense. That the judgment and decree of said District Court of the United States was affirmed by said Circuit Court of Appeals of the United States and no review thereof was sought in this Court, so that said judgment became final. That under and pursuant to said judgment, and because of the unconstitutional and unlawful acts of the taxing officials of the same taxing district, for the same years involved in this cause as determined in said action, the shares of stock of said Des Moines National Bank were subjected to taxation at only five mills on the dollar.

Respondents, by way of answer in said action, admitted that levies were made upon the shares of peti-

tioner substantially as alleged in the petition, but pleaded other defenses which may be summarized as follows:

1. A denial of facts not admitted.

2. That the money paid by the petitioner in each of the years in controversy had been distributed to the various political subdivisions entitled thereto, and respondents had no money with which to make refund to petitioner if the court were to so decree.

3. The statute of limitations.

4. Laches.

5. That the petitioner had a plain, speedy, and adequate remedy at law.

6. That the remedy of the petitioner, if any, is by appeal from the action of the board of review.

7. The petitioner is not entitled to maintain an action in mandamus.

8. That petitioner may not recover because of a violation of the taxing statutes of Iowa by the taxing officers.

9. That the petitioner does not come into court with clean hands, in that during the years in controversy the plaintiff, through its officers and agents, assisted and aided other taxpayers in evading and dodging taxation in Polk County, Iowa, and elsewhere.

10. That petitioner may not maintain an action to procure refunds of the taxes upon its shares of stock,

even though paid by it, because it is not the proper party to maintain such action.

11. That the District Court was without jurisdiction to grant the relief prayed, for it affirmatively appeared, that, after the institution of the action, the board of supervisors had denied the claim, and that such action by the board of supervisors constituted a judicial determination and finding, which cannot be collaterally attacked in a mandamus action, and that petitioner's remedy, if any, was by certiorari and not by mandamus.

12. That there was no adjudication in the action in the United States Courts, except an adjudication that the county treasurer should be enjoined from collecting certain taxes upon the shares of the Des Moines National Bank, and that the same was in no way binding upon the respondents.

Upon the trial of said action the following material facts were adduced:

In January of each of the years involved, petitioner made to the city assessor of Des Moines, Iowa, a statement as required by Section 1322, Code of Iowa 1897, and 1322-1-*a*, Code Supplement 1913 (R. 230-231, 1061), which disclosed the total amount of capital, surplus and undivided earnings and the book value of the real estate of petitioner as of January 1st of each year. The said city assessor made one assessment in a lump sum upon all the shares of petitioner, and entered the same under the head "corporation stock" upon form No. 1 of the assessment rolls (R. 229, 230, 1064, 1065).

The assessment rolls were, as required by statute, laid before the City Council of the City of Des Moines sitting as a board of review in each year by said assessor, and said board of review adjourned *sine die* on April 30, 1919, for that year, on May 1, 1920, for that year, on April 20, 1921, for that year, and on May 6, 1922, for that year (R. 619, 620).

Corporations engaged in the loan business made statements to the city assessor for taxation purposes in each of the said years upon forms furnished by the assessor (R. 1056, 1057), and the assessor made assessments upon the shares of such corporations upon form No. 1 of the assessment roll and entered the same under the head "corporation stock" (R. 1053). When such assessments had been completed, and after the board of review had met and adjourned in each of said years, the assessor copied the assessments into books referred to as assessor's district books (R. 1070, 274). The assessor's books were then certified and transmitted to the county auditor, and such assessments on the assessor's district books (other than the assessments of banks and trust companies) as "corporation stock" were placed on the tax list in each of said years as "moneys and credits" and taxed at the rate of five mills on the dollar (R. 277-281). All assessments upon the shares of mortgage loan companies, investment companies, and companies engaged in the purchase and sale of commercial paper, were uniformly and intentionally taxed at such rate of five mills on the dollar in all of the said four years (R. 280).

The city assessor made assessments against individuals holding notes, bonds, mortgages, and other evidences of indebtedness on form No. 2 of the assessment roll (R. 660, 1059), from which the debts of the taxpayer were deducted from his credits, and the net amount was certified upon the assessor's district books to the county auditor. In the four years in question all such net assessments against individuals owning notes, mortgages, bonds, or other evidences of indebtedness, were taxed at five mills on the dollar (R. 278).

There was no moneyed capital in the hands of individual citizens taxed at a higher rate than five mills on the dollar (R. 278, 285).

The consolidated levy, in each of said years consisted of the total millage requirements for state, county, city and school purposes (R. 172), and for the year 1919 was 137.8 mills; 1920, 157 mills, 1921, 164 mills; 1922, 160.4 mills (R. 172), which millage was applied to 20 per cent of the total value of the shares of stock of petitioner as assessed by the assessor (R. 35). The tax lists were made up by the county auditor after the assessor's books and assessment rolls had been certified to him, after the board of review had adjourned in each of said years, and were not completed until after it was known what the consolidated levy millage rate would be (R. 276). In 1919 this rate was not known until after September 19 (R. 628); in 1920 until after September 7 (R. 626); in 1921 until after November 17 (R. 627); in 1922 until after September 22 (R. 627). The total assessed values of the shares in all national and state banks and

trust companies in the City of Des Moines in said years was as follows:

	1919.	1920.	1921.	1922.
National Banks.....	$3,099,205	$3,276,168	$3,587,657	$3,485,535
State Banks and Trust Companies	4,519,134	4,634,356	6,320,367	6,086,481

(R. 788.)

The shares of stock of 27 domestic corporations, engaged in various phases of the loan and investment business in Des Moines in said years were assessed by the city assessor as "corporation stock" on form No. 1, the same as the assessment of petitioner's stock, and as such approved by the board of review, but said assessments were by the county auditor, long after the final adjournment of the board of review in each of said years, placed upon the tax list as "moneys and credits" (R. 280, 285), and taxed at five mills on the dollar of valuation. The assessments upon such shares of said corporations totaled the following sums:

1919.	1920.	1921.	1922.
$1,822,452.00	$4,984,543.00	$6,813,030.00	$6,685,526.00

Two of these corporations, the shares of which were originally assessed as "corporation stock" but which were subsequently placed on the tax list and taxed at the five-mill rate, were Joint Stock Land Banks, organized under the Act of Congress, engaged in making loans on farm lands within the State of Iowa (R. 258, 259). Fifteen other corporations made, sold and discounted mortgage loans, secured by liens on Iowa real estate, either farm lands or city property (R. 235-252,

inc., 256, 295, 323, 330, 338, 357, 340, 345, 346, 352, 365, 382, 383, 387, 389, 782, 783, 655 to 657, inc.).

Three corporations were engaged in financing public improvement contractors, making advancements to the contractors to enable them to complete their contracts and taking in payment the securities issued by counties or municipalities to the contractors. These securities were then sold to investors (R. 236, 237, 296, 324). Four of such corporations financed dealers in automobiles by the purchase of notes or acceptances, secured by liens on motor vehicles in the possession of the dealer, or in the hands of purchasers (R. 341, 375, 287, 309). Two corporations made loans secured by liens on feeder cattle (R. 780, 338). Eight of the corporations engaged in selling Government, municipal, public utility, and industrial bonds to individual investors and institutions located in Des Moines and elsewhere (R. 236, 296, 323, 340, 382, 783, 404, 305). Some of the corporations made collateral loans, both for their own account and for other investors, and discounted notes and acceptances, secured by liens on household appliances and other personal property (R. 326, 287). Substantially all phases of the loan and investment business were covered by the business operations of these corporations.

In each of said years certain foreign corporations, copartnerships, and individuals operating under trade names in Des Moines, Iowa, engaged in various phases of the loan business, were assessed by the city assessor on the net amount of money actually used in the business as "moneys and credits" on form No. 2, and such

assessments were approved by the Board of Review. After the final adjournment of the Board of Review, such assessments were placed upon the tax list and taxed at five mills on the dollar of valuation by the county auditor. Such assessments were in the total sums of

1919.	1920.	1921.	1922.
$146,263.00	$453,168.00	$278,846.00	$382,072.00

Six of these taxpayers, whose net assessments aggregated approximately $100,000.00 in each of the four years, were engaged in the "small loan" business, which consisted of making loans not exceeding $300.00, secured by chattel mortgages on household furniture and automobiles, most of the loans being payable in installments (R. 321, 623, 732, 693, 319, 691). One of the taxpayers was engaged in the business of making loans on feeder cattle, secured by chattel mortgages (R. 313). Two taxpayers were engaged in financing automobile dealers through the purchase of acceptances or sales contracts, collaterally secured by liens on automobiles in the hands of dealers or in the hands of purchasers (R. 299, 336).

During the four years in question, large numbers of individual taxpayers, residing in the City of Des Moines, held notes representing loans made by the individual secured in some instances by real estate mortgages, or other collateral—in other instances unsecured. Individual taxpayers also held bonds of railroads, public utilities and industrial concerns, representing investments made by the taxpayer. Assess-

ments upon securities of such character were uniformly made on form No. 2 of the assessment roll as "moneys and credits." The good faith indebtedness of the taxpayer was deducted from the gross amount and the net assessment was taxed at five mills on the dollar.

Evidence was introduced showing the character of loans and securities held by individual taxpayers, the net assessments of which totaled:

1919.	1920.	1921.	1922.
$1,422,274.00	$1,768,048.00	$1,587,436.00	$1,783,765.00

The petitioner, during the years in question, had accounts of approximately 400 banks located in Iowa, to many of which it loaned money (R. 494). It made loans to automobile dealers located in Des Moines and elsewhere in Iowa. The loans were evidenced either by the direct unsecured obligation of the dealer, or by collateral notes, with warehouse receipts covering cars in warehouses, or by the discount of notes given, by purchasers of automobiles, to the dealers (R. 495-498, 505-509, 514). It advanced credit to distributors of automobiles upon drafts secured by bills of lading covering cars shipped to local dealers by the distributors (R. 497). It discounted trade acceptances and installment notes for the purchase of apparatus or equipment, as well as trade acceptances and notes given to dealers as part of the purchase price of merchandise (R. 498). It discounted municipal and school district warrants (R. 503). It extended credit on notes secured by warehouse receipts covering various types

of commodities in storage and in transit (R. 500). It extended credit for the purpose of providing funds for the purchase and feeding of cattle, some of such loans being evidenced by the direct note of the borrower without chattel mortgage security. It rediscounted for its correspondent banks notes of customers of such banks secured by chattel mortgages on cattle (R. 501). It made loans to individuals of less than $300.00, such loans in typical months averaging from 161 to 200. Many of such loans were made with the expectation that they would be paid off in installments (R. 502). It purchased, sold, and dealt in United States Government securities, and other bonds and securities, some of which it sold to its customers. It bought bonds of Iowa municipalities, and some municipalities outside of Iowa. It held industrial bonds and foreign government bonds (R. 565). If financed contractor engaged in public improvement work throughout the State of Iowa, and purchased, at an agreed price, public improvement certificates or bonds in which the contractors were paid (R. 508, 547). It extended credit secured by mortgages on Iowa farms, and purchased and carried real estate mortgage loans for its correspondent banks, and for insurance companies and individuals (R. 503). It discounted notes of companies engaged in the tire and rubber business (R. 507, 551).

The petitioner offered in evidence excerpts from the annual reports of the Comptroller of the Currency, which disclosed that during the years 1919 to 1922 National Banks in Des Moines, and other cities and towns in Iowa, held substantial amounts of loans se-

cured by mortgages on improved real estate, loans secured by warehouse receipts covering commodities in storage and in transit and discounted acceptances and commercial paper collaterally secured by liens on merchandise, cattle, stocks, bonds and other personal property. The reports of the Comptroller of the Currency also disclosed that during the four years National Banks in Des Moines, and other cities and towns in Iowa, held large amounts of United States Government bonds and notes, state, county and municipal bonds, railroad, public utility and other public service corporation bonds and industrial bonds (R. 661 to 680, inclusive).

The county auditor, or his deputy under his authority, in making up the tax list in each of the years involved, placed all assessments of stock of domestic corporations engaged in the loan and investment business in Des Moines thereon under the head "Moneys and Credits", and applied thereto a tax at the rate of five mills on the dollar (R. 620). The auditor testified that when he placed the assessments upon the shares of stock of such domestic corporations under the heading "Actual Value Moneys and Credits" he knew it would result in the application of a tax of five mills on the dollar and no more, and he did so with the intention that the taxes would be computed on that basis, and he knew that it would result in a substantially lesser amount of taxes upon such shares than if they were placed upon the tax list and the consolidated levy rate applied; that no shares of stock of such corporation were placed upon the tax list and taxed

at the consolidated levy rate; that to the assessed value of such shares the rate of five mills on the dollar was applied by him as county auditor with the intention that the taxes would be so collected by the county treasurer (R. 280); that in so listing such shares of stock he did so under his own interpretation that the statutes of the State gave him the right, as county auditor, to make changes, and after he had taken the subject up with the legal advisers for the board of supervisors and county auditor at the time (R. 281).

With respect to the assessments of the Security Loan & Investment Company for the years 1919 and 1920, he, as county auditor, originally entered the assessed value of the shares of the said company on the tax list under the column "Taxable Value of Personal", and the tax was computed at the consolidated levy rate. But subsequently he changed such list so as to list such shares as "moneys and credits" subject to a tax at the five-mill levy, and at the time he made such change he knew it would in fact reduce the taxes upon the shares of said company and intended that such change should take such shares from the "high levy" to "moneys and credits" which were taxed at the rate of five mills on the dollar (R. 268). Similar changes were made in the assessments of the Des Moines Joint Stock Land Bank, the Central Iowa Joint Stock Land Bank, and the Des Moines Morris Plan Bank for the year 1921, and for the latter two companies for the year 1922 (R. 269 to 273, inclusive).

Assessments against individuals, non-resident corporations and co-partnerships on account of loans of

money or similar credits were all subjected to a tax of but five mills on the dollar. There was no moneyed capital, whether in the hands of individuals or in the form of shares of stock of corporations, that was in fact taxed upon the same basis with the shares of stock in banks and trust companies, *i. e.* at the consolidated levy rate (R. 285).

In the years in question, the Des Moines National Bank, a corporation organized under the national bankings laws, the Bankers Trust Company, and the Iowa Loan and Trust Company, corporations organized under the laws of Iowa, were engaged in the banking business in Des Moines. On January 20, 1923, these banks filed bills in equity in the United States District Court for the Southern District of Iowa, against the county treasurer of Polk County, Iowa, seeking injunctions against the collection of all taxes upon their shares of stock in excess of five mills on the dollar of assessed valuation (R. 863). On May 5, 1925, a Special Master appointed in said causes filed his report in which he found as follows:

> "CONCLUSION: It is my conclusion that moneyed capital in the hands of individual citizens of this state and living in Des Moines, Iowa, was taxed at five mills on the dollar of actual valuation, and that substantial amounts of such moneyed capital was so taxed during the years 1919, 1920, 1921 and 1922, and that it was the habitual practice of the taxing officers of Polk County to so tax moneyed capital in the hands of individuals, and that it was intentionally so

done by them. That the complainants are entitled to relief and that the defendant, or his successor in office, should be enjoined from collecting or attempting to collect taxes from the complainants in excess of a sum computed at five mills on the dollar of the assessed valuation of the shares of stock of each of said complainants for the four years in question, as such sums are set forth in the table in division VII hereof, together with interest upon such sums at the rate of 6% per annum from the date they were payable" (R. 990).

Exceptions were filed to the said report but were overruled, and a decree was entered by said court in each of said suits perpetually enjoining the collection of taxes upon the said shares at rates in excess of five mills on the dollar (R. 1008 to 1012, inc.). An appeal was prosecuted to the Circuit Court of Appeals for the Eighth Circuit which upon submission affirmed the judgment of the District Court, the opinion of the Circuit Court of Appeals being dated February 28, 1927, and appears on pages 1015 to 1032, inclusive, of the Record. This opinion is reported in 18 Fed. (2d) 269. The board of supervisors of Polk County paid bills for reporters, witnesses, and attorneys' fees, court costs, printing bills, and fees of counsel for appellant in said cause (R. 779).

On November 28, 1923, the petitioner offered to pay the county treasurer the amount of taxes upon the assessed value of its shares for the years in question, computed at the rate of five mills on the dollar, with interest. On November 30, 1923, the petitioner, pur-

suant to demand of the delinquent tax collector (which included the threat to proceed by distress and sale of petitioner's property for the collection of said taxes and additional penalties), paid taxes and penalties as hereinbefore set forth, and at the time of said payment filed with the county treasurer its protest in writing (R. 24). Petitioner filed with the county auditor its claim for refund of the taxes and penalties so paid, on September 14, 1925, and the board of supervisors on July 15, 1927, denied said claim for refund (R. 595). The county treasurer, after the filing of the petitioner's claim, remitted funds to the Treasurer of State, to the City Treasurer of Des Moines, to the Treasurer of the Independent School District, and also retained funds for county purposes in the following amounts:

Year.	To Tresurer of State.	City Treasurer.	School Treasurer.	County.
1926	$502,103.00	$2,724,250	$2,972,351	$1,333,597
1927 (11 mo.).	488,715.00	2,743,833	2,880,859	1,171,223

(R. 738.)

And the amount of money to be collected in Des Moines in 1928, as shown by the tax lists at the time of the trial was:—

State	$[illegible],295
County	1,197,457
City	2,737,872
School	3,038,901
Soldiers' Bonus (State)	32,003
Moneys and Credits	160,010

(R. 862.)

The action was tried in the District Court of Polk County, Iowa, which rendered a decree denying to

the petitioner the relief sought without findings of fact or of law, and without an opinion by the presiding judge; petitioner perfected an appeal to the Supreme Court of the State of Iowa. Said Court on September 26, 1930, rendered its opinion and entered its order confirming the judgment of the District Court (R. 1900), (232 N. W. 445). By said opinion, which was concurred in by five members of the Court, four members dissenting and filing a dissenting opinion (R. 1917), it was held that although under the statutes of Iowa the method of assessment and taxation of the shares of stock of petitioner was clearly defined and mandatory upon the taxing officials, nevertheless as to the large number of individuals and corporations owning moneyed capital in a substantial amount which was in fact assessed and taxed as "moneys and credits" at five mills upon the dollar of actual valuation, while the shares of stock of petitioner were taxed at from five to seven times such rate, petitioner's remedy was solely by appeal from the action of the assessing bodies. That as to corporations in competition with petitioner in the said taxing district in the said years, whose shares of stock were assessed as "corporation stock" or moneyed capital, but whose assessments were changed by the county auditor to "moneys and credits", and thereby subjected to a tax at only five mills on the dollar (whereas the shares of stock of petitioner were taxed at from five to seven times such rate), the petitioner was not entitled to relief because the county auditor acted unlawfully in making such change, and

although under the statutes of the State of Iowa he was the only official to whom there was remitted the power of making the tax lists, and although he acted under advice of counsel for the board of supervisors of Polk County, and although he acted intentionally and as a result of a system, his acts being so unlawful were not binding upon the State and its political subdivisions, and in so doing he was a mere usurper of authority. The Iowa Supreme Court also held that the decision of the Circuit Court of Appeals of the United States, although final, and although upon a Federal question, was not controlling upon the courts of the State of Iowa, although they should give respectful consideration to such decision.

On December 8, 1930, petitioner presented to Justice Butler of this Court its motion for an extension of time within which to file petition for writ of certiorari, and on that date he entered an order extending such time for a period of sixty days therefrom.

Reasons Relied On for the Allowance of the Writ.

1. The Supreme Court of the State of Iowa is the highest court of the State in which a decision in said cause could be had, and is the court of last resort in said State, and the judgment and decree of the district court of Polk County, as finally affirmed and confirmed by the final order, opinion, judgment, and decree of the Supreme Court of Iowa, as aforesaid, became, was, and is a final judgment and decree in said cause within the meaning of Section 237 of the Federal Judicial Code, and therefore is reviewable by

this Honorable Court upon writ of certiorari under the provisions of said Section 237.

2. This is a cause wherein a final judgment or decree has been rendered or passed by the highest court of the State of Iowa, in which the validity of the statutes of the State of Iowa, as administered by the officers and agents of the State of Iowa, is drawn in question on the ground of their being, as so administered, repugnant to the Fourteenth Amendment to the Constitution of the United States, and as well Section 5219 of the Revised Statutes of the United States.

3. This is a cause wherein a final judgment or decree has been rendered or passed by the highest court of the State of Iowa, wherein a right or privilege is specially set up and claimed by the petitioner under the Fourteenth Amendment to the Constitution of the United States, and as well under Section 5219 of the Revised Statutes of the United States, and such judgment or decree erroneously denies the petitioner such right or privilege.

4. The Supreme Court of the State of Iowa, being the highest court of said State in which a decision could be had, has decided a Federal question of substance in a way not in accord with applicable decisions of this Court, including the cases of First National Bank of Hartford *v.* Hartford, 273 U. S. 548; Minnesota *v.* First National Bank of St. Paul, 273 U. S. 561; Cummings *v.* Merchants National Bank, 101 U. S. 151; Reagan *v.* Farmers Loan & Trust Co., 154 U. S. 364; Carpenter *v.* Shaw, 280 U. S. 363; Montana Na-

tional Bank *v.* Yellowstone County, 276 U. S. 499; Ward *v.* Love County, 253 U. S. 17.

5. The Supreme Court of the State of Iowa, being the highest court of said State in which a decision could be had, has decided a Federal question of substance in conflict with the decision of the United States Circuit Court of Appeals for the Eighth Circuit involving the same questions and the same facts, in the same taxing district, being the case of Munn, Treasurer, *v.* Des Moines National Bank, and two other cases, 18 Fed. (2d) 269, which decision became final, and which constituted an adjudication binding upon respondents.

6. The Supreme Court of Iowa, being the highest court of said State in which a decision could be had, has decided important questions of general law in a way untenable and in conflict with the weight of authority.

7. The decision and judgment of the Supreme Court of Iowa, being the highest court of said State in which a decision in said cause could be had, denies to petitioner the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States, in that in the administration of the statutes of Iowa by officers of the State and its political subdivisions there was an intentional, systematic, general, and habitual method or plan of taxation whereby large and substantial amounts of other moneyed capital within the meaning of Section 5219 of the Revised Statutes of the United States were

taxed at from one-fifth to one-seventh as much as the taxes imposed upon the assessed value of the shares of petitioner.

8. The decision and judgment of the Supreme Court of Iowa, being the highest court of said State in which a decision could be had in said cause, denies to petitioner the right to have its shares of stock taxed at a rate not greater than that imposed upon other moneyed capital in the hands of individual citizens of said State, and is therefore contrary to and in conflict with the provisions of Section 5219 of the Revised Statutes of the United States.

Specification of Errors.

Your petitioner further shows that the final decision, judgment, and decree of the Supreme Court of Iowa, affirming the judgment of the District Court of Polk County, Iowa, entered in said cause, is erroneous in the following respects:

a. Because it is thereby decided, established, and adjudged that petitioner's shares, being shares of a national bank, may be taxed at a greater rate than is imposed upon other moneyed capital in the hands of individual citizens of said State, contrary to the provisions of Section 5219 of the Revised Statutes of the United States.

b. Because the said decision and judgment of the Supreme Court of Iowa denies to petitioner the equal protection of the laws, contrary to the Fourteenth

Amendment to the Constitution of the United States, in that in the administration of the statutes of Iowa by officers of the State and its political subdivisions there was an intentional, systematic, general, and habitual method or plan of taxation whereby large and substantial amounts of other moneyed capital within the meaning of Section 5219 of the Revised Statutes of the United States were taxed at rates from one-fifth to one-seventh as much as the taxes imposed upon the assessed value of the shares of the petitioner.

c. Because by said decision and judgment the said Supreme Court of Iowa held that there was no intentional, systematic, general, and habitual method or plan of taxation in the administration of the statutes of Iowa by officers of the State and its political subdivisions, whereby large and substantial amounts of other moneyed capital within the meaning of Section 5219 of the Revised Statutes of the United States were taxed at rates of from one-fifth to one-seventh as much as the taxes imposed upon the assessed value of the shares of petitioner.

d. Because by said decision and judgment the Supreme Court of Iowa held that the acts of the county auditor in making the tax list, or in making changes in the tax list, so as to subject the shares of stock of competing corporations to a tax of from one-fifth to one-seventh as much as the tax to which plaintiff's shares were subjected, were illegal and void acts of a merely ministerial or clerical officer, were a mere nullity, were the result of usurped authority, and were

not the acts of the State taken through its duly constituted officers, and were not binding upon it.

e. Because the said decision and judgment of the Supreme Court of Iowa held that the "State and all of its authorized officials have acted in the utmost good faith and in accordance with the constitutional and statutory rights of petitioner."

f. Because by said decision and judgment the Supreme Court of Iowa held that there was no discrimination in the levy or assessment as between the petitioner and competing corporations and that the State had not knowingly and wilfully discriminated in the collection of taxes.

g. Because the said decision and judgment of the Supreme Court of Iowa denied to petitioner its rights arising under the Fourteenth Amendment to the Federal Constitution and Section 5219 of the Revised Statutes of the United States upon the ground, in part, that it did not appear that the illegal acts of the county auditor were ever called to the attention of the board of supervisors, the executive council, the department of justice, the legislature, or any of the authorities of the State who had any power of supervision or duty to enforce correction of the misfeasances of the county auditor or county treasurer.

h. Because the decision and judgment of the Supreme Court of Iowa held that it was not bound by the decision of the Circuit Court of Appeals for the Eighth Judicial Circuit in Munn *v.* Des Moines National Bank

and Munn *v.* Bankers Trust Company, 18 Fed. (2d) 269, which decision became final and which decision was of the identical Federal questions and upon the identical facts involved in this case, and constituted an adjudication of the questions there decided binding upon respondents.

i. Because said decision and judgment of the Supreme Court of Iowa held that as to other moneyed capital in the hands of individuals and foreign corporations assessed by the assessor, reported by him to the board of review, approved by that board, entered upon the tax books, and so returned to the county auditor as "moneys and credits" and subjected to taxes at five mills on the dollar of assessed valuation, petitioner had an available remedy by appeal from the board of review, and that such remedy was exclusive.

A certified copy of the entire record in said suit, including the record and proceedings and papers filed or had in the Supreme Court of the State of Iowa, is herewith furnished, attached to, and made a part of this petition, in compliance with Rule 38 of the Rules of this Court.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of Iowa, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all the proceedings

in the case numbered and entitled on its docket No. 39843, Iowa-Des Moines National Bank, Appellant, *v.* J. M. Stewart et al., Appellees, and that the said decree and judgment of the Supreme Court of Iowa may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just. And your petitioner will ever pray.

IOWA-DES MOINES NATIONAL BANK,
By J. G. GAMBLE,
A. B. HOWLAND,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No.

IOWA-DES MOINES NATIONAL BANK,
PETITIONER,

v.

J. M. STEWART ET AL., RESPONDENTS.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinion of the Court Below.

The opinion of the Supreme Court of Iowa has not been officially reported. It was rendered on September 26, 1930, and appears in the Record beginning at page 1900. It has been reported in 232 N. W. 445.

II.

Jurisdiction.

1. The jurisdiction of this Court is sustained by Judicial Code Section 237 as amended by the Act of February 13, 1925, 43 Stat. 938.

2. The date of the judgment to be reviewed is September 26, 1930 (R. 1960). Application for extension of time within which petition for a writ of certiorari might be filed in this cause was made to Justice Butler on December 8, 1930, and an order extending such time for sixty days from and after December 8, 1930, was on that date granted by Justice Butler (R. 1967).

3. There has already been stated in the preceding petition under "Summary Statement of the Matter Involved" and "Reasons Relied on for the Allowance of the Writ" (pp. 1, 21) the nature of the case and the rulings below which were such as to bring the case within the jurisdictional provision relied on, and the same are hereby adopted and made part of this Brief.

4. The cases believed to sustain said jurisdiction are as follows:

First Nat. Bank of Hartford *v.* Hartford, 273 U. S. 548.

Minn. v. First Nat. Bank of St. Paul, 273 U. S. 561.

Cummins *v.* Merchants Nat. Bank, 101 U. S. 151.

Green *v.* L. & I. Ry. Co., 244 U. S. 499.

Reagan *v.* Farmers Loan & Trust Co., 154 U. S. 364.

Carpenter *v.* Shaw, 280 U. S. 363.

Montana Nat. Bank *v.* Yellowstone County, 276 U. S. 499.

Ward *v.* Love County, 253 U. S. 17.

III.

Statement of the Case.

This has already been stated in the preceding petition under "Summary Statement of the Matter Involved" (p. 1), which is hereby adopted and made part of this Brief.

IV.

Specification of Errors.

Specification of Errors (*a*) to (*i*), inclusive, have been set forth in the preceding petition (p. 24), and are hereby adopted and made part of this Brief.

ARGUMENT.

Summary of the Argument.

The decision below is of rights arising under the Fourteenth Amendment to the Constitution of the United States and Section 5219 of the Revised Statutes of the United States, and is contrary to and in conflict with prior decisions of this Court and of final decisions of other federal courts.

The decision below denied a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion, and is in itself a contravention of the Fourteenth Amendment.

The decision below is of substantial federal questions and is based upon untenable conclusions of general law and is in conflict with the weight of authority.

By a five-to-four decision the Supreme Court of Iowa has denied to petitioner substantial rights arising under the Constitution and laws of the United States.

Petitioner is a national bank, and as said by this Court in First National Bank of Guthrie Center *v.* Anderson, 269 U. S. 341:

> "National banks are not merely private moneyed institutions, but agencies of the United States, created under its laws to promote its fiscal policies; and hence the banks, their property, their shares cannot be taxed under state authority except as Congress consents, and then only in conformity with the restrictions attached to its consent."

This consent was evidenced by Section 5219 of the Revised Statutes of the United States which, during the period involved in this case, expressly imposed thereon the restriction that "the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state".

Recognizing the limitation thus placed upon its power to tax the shares of national banks, the State

of Iowa through its legislature prior to the times involved in this case had provided:

> "All moneyed capital within the meaning of Section 5219 of the Revised Statutes of the United States shall be listed and assessed against the owner thereof at his place of business, and, if a corporation, at its principal place of business, at the same rate as state, savings, national bank, and loan and trust company stock is taxed in the same taxing district and at the actual value of the moneyed capital so invested" (Section 1310, Supp. to the Code of Iowa 1913, Sec. 1322, 1322-1-*a*, Supp. to the Code of Iowa 1913).

Notwithstanding the restriction so placed upon the consent of the Congress to the taxation of shares of national banks, and notwithstanding the provisions of the statutes of the State of Iowa requiring conformity to such restrictions in the taxation of national bank shares, nevertheless, the record shows in great detail facts which sustain the contention of petitioner that in each of the years in question relatively large and material amounts of other moneyed capital within the meaning of Section 5219 of the Revised Statutes were taxed at rates from one-fifth to one-seventh as much as the rates of tax imposed upon petitioner's shares.

Indeed, the majority opinion of the Supreme Court of Iowa concedes that in each of the years involved in this case there were a large number of domestic corporations employing moneyed capital in competition with petitioner, and a large number of persons and a

few foreign corporations employing moneyed capital in competition with petitioner, which capital was listed and taxed at the rate of five mills on the dollar of actual valuation as "moneys and credits", while the consolidated levy varying from 137.8 to 164 mills in said years was applied to 20 per cent of the valuation of petitioner's stock, resulting in a much larger tax thereon than if the five-mill levy had been applied to the full valuation of petitioner's stock. By the majority decision of the Iowa court this competing moneyed capital is placed in two classes: (*a*) competing capital, the assessments of which as made by the assessor and as approved by the board of review, entered upon the assessor's books, and returned to the county auditor, were by the same mode and at the same rate as those against the petitioner, but in respect to which the alleged discrimination resulted from subsequent acts of the county auditor in attempting to change them. This capital was in the hands of domestic corporations. (*b*) Competing capital, the assessment of which as made by the assessor, reported by him to the board of review, approved by that board, entered upon the tax books, and so returned to the county auditor as on the alleged discriminatory basis now complained of. This capital is that in the hands of individuals and foreign corporations.

We desire to consider the questions presented in the light of the assessments of these classes of competing capital in the order stated.

(*a*) In each of the years involved, petitioner, as required by statute, made sworn statements to the as-

sessor for the assessment of its shares of stock. The assessor assessed such shares as "corporation stock," made up the assessment rolls accordingly, fixing the value on the basis of the sworn statements. This assessment was approved by the board of review, and the assessor's books were made up and returned to the county auditor in conformity with the sworn statements and assessment rolls. The county auditor so entered them upon the tax books, fixing the taxable value at twenty per cent of the actual value, and applied to such taxable value the consolidated levy for the respective years, which varied from 137.8 to 164 mills.

In so doing, the assessor, board of review, and the county auditor performed purely ministerial acts imposed by mandatory statute. As said by the Supreme Court of Iowa in First National Bank of Remsen *v.* Hayes, County Auditor, 186 Iowa, 892:

> "Enough has been said to indicate that the duty performed by the assessor in ascertaining the value of bank stock is merely ministerial in its nature. All exacted of him is accurate computation. In estimating the value of other property, he is required to determine its value according to his best judgment, and therein exercises a quasi-judicial function. See Talley *v.* Brown, 146 Iowa, 360. A ministerial act has been defined as 'one which a person or board performs upon a given state of facts, in a prescribed manner, in observance of the mandate of legal authority, and without regard to or the exercise of his own judgment upon the propriety of the act being done.' * * *

> "Here, the assessor is merely required to make computation from the statements furnished him, and must have, in the performance of his duty as assessor, assessed the shares of stock in the bank in accordance with computations actually made, and therein performed purely ministerial duties; and he should have assessed the bank stock in accordance with such computation. Whether he made a mistake in computation or undertook to exercise his judgment in ascertaining the value of the shares of stock is not material. In either event, the error in the assessment was such as contemplated in Section 1385-*b* of the Code Supplement, 1913, and the auditor acted within his authority in making the corrections."

See also Security Savings Bank *v.* Board of Review, 189 Iowa 463; Avoca State Bank *v.* Burke, County Auditor, 193 Iowa 1055.

During these same years a large number of domestic corporations employing the competing capital included in this class made like sworn statements to the assessor, who used the same classification and assessment, and made up and returned to the county auditor the assessment rolls and the assessor's books in indentically the same form, and on the same basis as in the case of petitioner's stock.

Either before or after the tax books made by the county auditor had passed into the hands of the treasurer, but before payment of the taxes, the county auditor made entries therein so that the assessments against such competing capital were extended on the

tax books as "moneys and credits," and applied thereto the five-mill levy on the dollar of actual valuation, under Section 1310, Code Supplement 1913, instead of the application of the consolidated levy upon 20 per cent of the valuation, as was done in the case of petitioner, and this resulted in a much larger tax upon petitioner than upon such competing capital.

Every clear discrimination against bank shares and in favor of a relatively material part of other moneyed capital employed in substantial competition with national banks is a violation of both the letter and spirit of the restriction contained in Section 5219 of the Revised Statutes of the United States. First National Bank of Hartford *v.* City of Hartford, 273 U. S. 548; Minnesota *vs.* First National Bank of St. Paul, 273 U. S. 561; Merchants National Bank of Richmond *v.* Richmond, 256 U. S. 635; Allen Munn, County Treasurer, *v.* Des Moines National Bank, 18 Fed. (2d) 269.

> "The tax law as it leaves the legislative hands may not be obnoxious to any challenge, and yet the officers charged with the administration of that valid tax law may so act under it in the matter of assessment or collection as to work an illegal trespass upon the property rights of the individual."

Reagan *v.* Farmers Loan and Trust Company, 154 U. S. 362 at 390; Chicago and Northwestern Railway Company *v.* Osborne, 265 U. S. 14; Sioux City Bridge Company *v.* Dakota County, 260 U. S. 441; Munn *v.* Des Moines National Bank, *supra.*

The act of the county auditor and his deputy in placing the assessments on the shares of domestic corporations, employing capital in competition with the petitioner, upon the tax lists as "moneys and credits" and thereby subjecting such competing capital to rates of taxation much less than those imposed upon the shares of petitioner was an unlawful change of classification by the auditor. Ft. Madison Security Co. *v.* Maxwell *et al.*, 202 Iowa 1346.

Thus, the shares of petitioner have been subjected to a clear discrimination in taxation when compared to the taxes imposed upon a relatively material part of other moneyed capital, in violation of Section 5219 of the Revised Statutes of the United States as construed by this Court in First National Bank of Hartford *v.* Hartford, *supra;* Minnesota *v.* First National Bank of St. Paul, *supra;* Merchants National Bank of Richmond *v.* Richmond, *supra;* and by the Circuit Court of Appeals of the Eighth Judicial Circuit in Munn, County Treasurer, *v.* Des Moines National Bank, 18 Fed. (2d) 269, which was a case involving the alleged discrimination in the taxation of bank shares in favor of a relatively material part of other moneyed capital employed in substantial competition with national banks in the same taxing district, in the same years as involved in this case, and which decision became final, since no effort was made to have it reviewed by this Court.

Indeed, the majority opinion of the Supreme Court of Iowa in this case recognizes the existence of this clear discrimination against petitioner's shares in

favor of a relatively material amount of other moneyed capital within the meaning of the Revised Statutes, but undertakes to avoid the application of the holdings of this and other federal courts to like cases, and denies to petitioner the recovery of the taxes so illegally exacted from it because it is said that the acts of the county auditor were illegal and void acts of a merely ministerial, or clerical officer or employe, and the result was not one of bad faith, intent, or willfulness on the part of those who as its duly constituted officers represented the state; that the auditor's acts in making the tax list or in making changes in the tax list so as to subject the shares of stock of such competing corporations to a tax so much less than the tax to which the shares of petitioner were subjected were a mere nullity, and that the auditor was merely usurping authority and therefore his acts were not the acts of the state taken through its duly constituted officers, and were not binding upon it.

Such holding was but a declaration of general law concerning the powers of the county auditor and is wholly untenable for the following reasons: It was provided by Section 1072, Code of Iowa Supplement, 1913, that "there shall be elected in each county at general election in 1906 and in each even-numbered year thereafter an auditor * * * who shall hold office for the term of two years or until their successors are elected and qualified." The county auditor is required by statute on or before the first day of January in each year to transcribe the assessments of the several townships, towns, and cities into a book to

be provided at the expense of the county for that purpose, to be known as the tax list, properly ruled and headed with distinct columns in which shall be entered the names of the taxpayers, description of lands, number of acres and value, number of town lots and value, value of personal property, and each description of tax, with a column for polls and one for payments, and shall complete the same by carrying out the totals and footings of columns. Code of Iowa, Supplement 1913, Section 1383. The county auditor is required, before the 31st day of December of each year, to deliver the tax list to the county treasurer, and such list shall be sufficient authority for the treasurer to collect the taxes therein levied. Code of Iowa 1897, Section 1387. The county auditor may correct any error in the assessment or tax list, or may assess and list for taxation any omitted property. Code of Iowa, Supplement 1913, Section 1385-*b*. All taxing districts in the state, including townships, school districts, cities, towns, and counties, are required to certify to the county auditor the money needs of the district, and the rate of taxation shall be based upon the adjusted taxable valuation of such taxing district for the preceding year, and shall be computed and spread upon the records by the county auditor, and spread upon the tax list in his office. Chapter 343, Laws 37th G. A. The county treasurer is required by statute to collect the taxes, and the list shall be his authority and justification against any illegality in the proceedings prior to receiving the list. Code of Iowa 1897, Section 1390.

Neither the local assessor nor the board of review have any duty to perform under the statutes of Iowa

with respect to the quantity of the tax to be applied against the value of the property assessed by them. Their function is one of valuation. Nor does the county treasurer have any duty to perform with respect to the quantity of the tax to be applied against the assessed value of the property. His duty is one of collection. The basic factors which result in the fixation of the rate of tax applied against assessed valnations come either from taxing districts or statutes of the state, and all are required to be reported to and computed by the county auditor, whose duty it is to make the tax list, which constitutes the tax bill which is the foundation of the tax lien, and which imposes, once it is lodged in the hands of the county treasurer, the obligation of payment from the taxpayer. If error creeps into the tax list, either as a result of inadvertence or intention, the law imposes the duty of correction upon the county auditor. The treasurer has no authority to correct an error in the tax list, but is required to give receipt to taxpayers upon the tender of the amount shown by the tax list, and is required to furnish to the taxpayers the charge against them reflected by the tax list. Code of Iowa 1897, Sections 1396-7.

The mere assessment of values imposes no tax. The collection of tax payments is an act which can only be consummated after the imposition of a tax. Taxes are imposed by law, but the law in Iowa remits to the county auditor the application of the levy to the values, and he is the only agent of the state or any of its political subdivisions invested by law with authority

to impose the ultimate amount upon the taxpayer which represents his due proportion of the cost of government. It is an essential step in the fixation of tax liability in Iowa that the county auditor prepare the tax list. Perhaps he has no duty imposed upon him by law so important and so far-reaching in its effect as this duty. To say that he is not a duly constituted agent of the state and its political subdivisions in connection with the imposition of taxes such as involved in this case is to deny the express and unequivocal language employed by the legislature of the state in erecting the machinery for the exaction of the funds necessary for conducting the business of the government.

Indeed, the Supreme Court of Iowa in its prior decisions has recognized the county auditor as a duly constituted agent of the state and its political subdivisions in connection with the imposition of taxes, and awarded relief where the county auditor in the performance of such duties acted illegally. In Northwestern Bank of Ireton *v.* Van Roekel, 202 Iowa 237, the court had under consideration the action of the county auditor in increasing the assessment of the Northwestern Bank, a private bank, by the sum of $50,000. It held that the auditor in increasing the assessment departed from the objective of the legislature of the state to obtain substantial uniformity in the method of assessing state, national and private banks, and affirmed the judgment of the district court setting aside such additional assessment made by the county auditor. Involved in the case was the question

of the taxation of costs, and in considering that portion of the district court's judgment which taxed the costs of the proceeding to the county auditor, the court said:

> "We do not think that the costs should have been taxed against the auditor personally. *He acted officially and in good faith, and under the advice of counsel.*" (Italics ours.)

And the Supreme Court of Iowa in Fort Madison Security Company *v.* Maxwell, 202 Iowa 1346, held that the county auditor of Lee County acted illegally and beyond his power in listing upon the tax list the shares of stock of the Fort Madison Security Company as "moneyed capital" when such shares had been assessed by the assessor as "moneys and credits", and awarded relief to the Fort Madison Security Company by reason of the illegal and unauthorized act of the county auditor.

Furthermore, the Supreme Court of Iowa in the cases of First National Bank of Remsen *v.* Hayes, *supra*, and Avoca State Bank *v.* Burke, *supra*, clearly recognized the acts of the county auditor as acts of a duly constituted agent of the state and its political subdivisions, because it affirmed the imposition of additional taxes by reason of the acts of the county auditor.

The Iowa court, however, further predicated its denial of relief to petitioner, in part upon the statement that petitioner was the acting party and that it did not appear from the record that the illegal acts of the auditor were ever called to the attention of the

board of supervisors, the executive council, the department of justice, the legislature, or any of the authorities of the state who had any power of supervision or duty to enforce correction of the misfeasances of the county auditor or the county treasurer. There is no statutory provision in Iowa imposing any obligation upon petitioner to call to the attention of the parties referred to the illegal acts of the auditor, unless it arises under the statute relating to the refund of taxes, where the action of the board of supervisors is required to be invoked. The petitioner fully complied with this provision, since the illegal acts of the auditor were repeatedly, and at great length set forth in the claim filed with the board of supervisors, and the illegality of the taxes demanded and exacted by the county treasurer from petitioner was further called to the attention of the county treasurer in the protest filed with him at the time of the payment of such taxes and penalties. Furthermore, the county auditor is shown by the record to have consulted the legal advisers for the board of supervisors and himself at the time of making the entries on the tax list resulting in the discriminatory taxation. There is no provision of law which invests the executive council of the State of Iowa with any jurisdiction over the acts of the county auditor, and there is no means provided by law through which petitioner could have appealed to the legislature in this connection.

This effort on the part of the Supreme Court of Iowa, as reflected by the majority decision, to deprive petitioner of its legal right to recover money unlaw-

fully exacted from it by a discriminating tax on its shares, made after the tax was exacted still leaves the money illegally exacted in the treasury of the state and its political subdivisions, and will not be permitted to preclude the right of recovery by petitioner. Montana National Bank *v.* Yellowstone County, 276 U. S. 449.

Moreover, since by virtue of the facts disclosed in the record the petitioner's shares have been taxed at at greater rate than other moneyed capital, there was the assertion and proof of the existence of a federal right, and whether this federal right was denied or not given due recognition creates in itself a federal question, and, as said by this Court in Carpenter *v.* Shaw, 280 U. S. 363, the denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion, is in itself a contravention of the Fourteenth Amendment.

In this record it is conclusively shown that not only were the original taxes exacted of petitioner under compulsion, but that in addition, interest and penalties in the enormous sum of $71,976.58 were demanded and paid under the threats of the imposition of additional penalties and also of the seizure by distress and sale of the property of petitioner. Under such circumstances, as said in Ward *v.* Love County, 253 U. S. 17, "No statutory authority was essential to enable or require the county to refund the money." Although, by the terms of Section 1417 of the Code of Iowa, 1897 it was provided:

> "The Board of Supervisors shall direct the treasurer to refund to the taxpayer any tax or

portion thereof found to have been erroneously or illegally exacted or paid, with all interest and cost actually paid thereon."

And the Supreme Court of Iowa in Steele *v.* Madison County, 198 Iowa 902, had held that the proper procedure to enforce rights under this statute is by mandamus to compel the board of supervisors to order a refund thereof. See also Murphy *v.* Berry, 200 Iowa 974; Fort Madison Security Company *v.* Maxwell *et al.*, 202 Iowa 1346; Commercial National Bank *v.* Board of Supervisors, 168 Iowa 501.

It was the further claim of petitioner that as the result of the intentional, systematic, habitual, and arbitrary administration of the tax laws of Iowa by its officers and the officers of its political subdivisions there was a substantial discrimination in the taxation of its shares as compared to the taxation of other moneyed capital within the meaning of Section 5219 of the Revised Statutes of the United States and within the class created by Sections 1310, 1322, and 1322-1-*a*, Iowa Code Supplement 1913, and that thereby there had been denied to petitioner the equal protection of the law contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States. It is firmly settled by the decisions of this Court that the purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted

agents. Sunday Lake Iron Co. *v.* Wakefield, 247 U. S. 350; Sioux City Bridge Co. *v.* Dakota County, 260 U. S. 441; Cummings *v.* Merchants National Bank of Toledo, 101 U. S. 153; Greene *v.* L. & I. Railway Co., 244 U. S. 499; Chicago & N. W. Ry. *v.* Osborne, 265 U. S. 14; Raymond *v.* Chicago Union Traction Company, 207 U. S. 20.

The record in this case demonstrates that the county auditor in so making the tax list as to subject the shares of petitioner to largely discriminatory taxation when compared to other moneyed capital in the hands of individuals in each of the years involved acted intentionally and with the purpose, and during the whole course of time involved in this case, of bringing about the taxation of such other moneyed capital at such grossly favorable rates. This is shown by the direct admission of the county auditor and by the further fact that his acts were taken only after he had the benefit of legal counsel for the board of supervisors. That his acts were habitual and continuous is clearly disclosed by the record. There was no other moneyed capital than the shares of stock of banks and trust companies which were subjected to taxes at as great rates as the taxes imposed upon petitioner's shares. Thus, there is undoubted support for the statement of the Justices of the Supreme Court of Iowa who concurred in the dissenting opinion in this connection, as follows:

> "It is shown by the record, that the capital of national banks in the city of Des Moines during the years in question was about three

million dollars, while that of state banks was from four and one-half to six million dollars. The assessments upon the shares of stock found from the evidence to be competing institutions during said years, varied from about one and one-half millions in 1919 to an excess of five millions in 1922, and, under the rule laid down by the italicized portion of First National Bank of Hartford *v.* City of Hartford, *supra,* there has been a clear violation of section 5219 of the Revised Statutes of the United States.

The action, hereinbefore mentioned, of the county auditor, was intentionally done. It applied to all of the assessments upon the shares of stock of the competing corporations. Therefore, within the meaning of the authorities from which quotations are hereinbefore given, to wit, Reagan *v.* Farmers' Loan & Trust Company, 154 U. S. 362, 14 S. Ct. 1047, 38 L. Ed. 1014; Sioux City Bridge Company *v.* Dakota County, 260 U. S. 441, 43 S. Ct. 190, 67 L. Ed. 340, 28 A. L. R. 979; Cummings *v.* Merchants' National Bank of Toledo, 101 U. S. 153, 25 L. Ed. 903; Raymond *v.* Chicago Union Traction Company, 207 U. S. 20, 28 S. Ct. 7, 52 L. Ed. 78, 12 Ann. Cas. 757, and the other cases cited in connection therewith, an illegal discrimination has been worked against the appellant national banks and their shareholders by systematic, intentional, wrongful, and arbitrary administration of the law. In order for the appellant national banks to be entitled to relief, it is not a prerequisite that the action of the county auditor was done with intent to injure said banks. See Taylor *v.* L. & N. R. Co. (C. C. A.), 88 F. 350."

(*b*) In each of the years involved there were in the City of Des Moines a large number of persons, and a few foreign corporations, who were employing moneyed capital in competition with petitioner. The assessor classified and assessed this competing capital as moneys and credits. He made up the assessment rolls and assessor's books accordingly, and returned them to the county auditor. The county auditor extended these assessments upon the tax books as moneys and credits, and applied to them the five mill levy upon the net valuation, which resulted in a much lesser tax than if said moneyed capital had been subjected to taxation at the same rate as that imposed upon petitioner's shares. After making the assessments of moneyed capital, the assessor submitted the same to and they were approved by the board of review, which was composed of the city council of the City of Des Moines.

Although admitting the existence of a clear discrimination in connection with the taxation of such moneyed capital, the Supreme Court of Iowa denied to petitioner a recovery for the reason that under its holding petitioner was required to appear before the board of review and object to the discriminatory assessment of such moneyed capital in the hands of such large number of persons and foreign corporations, and to appeal from the action of the board of review to the District Court of Iowa. It was held that this was the exclusive remedy afforded to petitioner by the statutes of Iowa. Complaint as to the assessment of petition-

er's shares would have availed nothing, because as we have heretofore pointed out, the assessor and the board of review performed only ministerial duties under a mandatory statute, and in so far as the assessment of petitioner's shares was concerned, were limited merely to the computation of the value of such shares based upon the sworn statements required to be furnished by petitioner.

The record shows that the moneyed capital included in this class was held by several hundreds of persons, and the amount thereof in the aggregate was several millions of dollars. The time fixed by the statutes for a taxpayer to make complaint before the board of review was only a few days, and the Supreme Court of Iowa had held that the taxpayer coming before the board of review for relief must state his grievance "with sufficient particularity and must specify his complaint with such certainty to enable the tribunal supposing it to possess ordinary intelligence, to comprehend and understand the matters of which complaint is made, and to grant the particular relief sought for in the complaint. He is not entitled to have any question determined on appeal except such as he called the tribunal to determine in the first place". *First National Bank v. City of Council Bluffs,* 182 Iowa 107.

The complaint must present the alleged errors "with such facts as may lead to their correction". The city council of Des Moines was not a judicial body. The competitors of petitioner who had escaped four-fifths to five-sixths of the taxes they should have paid, and their employees, were not very likely to volunteer tes-

timony or evidence to sustain the claims of petitioner, and the city council had no power to issue subpœnas to compel them to testify. It was neither practical nor possible for the shareholders of petitioner to have searched out, learned, and stated to the city council within the times required by statute, the errors of which they complained, with such facts as may lead to their correction—much less to have had the city council so determine the question. As stated by Circuit Judge Sanborn in *Munn v. Des Moines National Bank, supra:*

> "In our opinion the facts of these cases, some of which have now been recited, clearly except them from the operation of the proposition that they must exhaust their remedy before the administrative board, because that remedy was not only inadequate but necessarily impractical and futile, and the Court below had plenary jurisdiction in equity to hear and decide the questions in these cases and to grant adequate relief to complainants."

Furthermore, this Court in Sioux City Bridge Co. *v.* Dakota County, *supra,* which involved the taxation of the property of petitioner in that case by the State of Nebraska on a basis that denied the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States, and in answer to the holding of the Supreme Court of Nebraska that the petitioner had no remedy except "to have the property assessed below its true value raised rather than to have property assessed at its true value reduced", said:

> "The conclusion in these and other Federal authorities is that such a result as that reached by the Supreme Court of Nebraska is to deny the injured taxpayer any remedy at all, because it is utterly impossible for him by any judicial proceeding to secure an increase in the assessment of the great mass of under-assessed property in the taxing district."

See also *Green v. L. & I. Ry. Co.*, 244 U. S. 499; *Taylor v. L. & N. Ry. Co.*, 88 Fed. 350.

And so we say that the holding of the Supreme Court of Iowa in this case in this respect is the equivalent of a denial to the petitioner of any remedy at all, and where, as here, there is involved a recovery of taxes exacted in violation of the law or Constitution of the United States by compulsion, it, as said by this Court in *Ward v. Love County, supra*, requires no statutory authority as an essential to enable or require the county to refund the money. See also *Carpenter v. Shaw, supra.*

In the majority opinion of the Supreme Court of Iowa it is said "it is only by inference that it can be said that the domestic corporations so owning and employing the competing moneyed capital admitted to have existed in the taxing district of Des Moines in the years involved have paid taxes only in accordance with the changes made by the auditor." But this statement is not sustained by the record. The tax lists for each of the years involved were in evidence. The statutes required the county auditor in the preparation of the tax lists to provide a separate column showing the date of payment. Page 383 of Exhibit 261, being the

tax list for 1919, is reproduced in the record as a typical example of the tax list, and shows the payment by the Security Loan and Investment Company of taxes computed on the five-mill basis on March 31, 1920, and on September 30, 1920, and the payment by Jesse F. Stevenson Company of taxes computed on the five-mill basis on the same dates. E. R. Bennett, one of the respondents in the case, and who was county treasurer at the time of payment testified that he had instructed his deputies and clerks to accept money for taxes as shown by the tax books whenever the amount offered was the amount shown to be due by the tax lists. The county auditor testified that when he made the tax lists, and placed thereon the shares of such corporations employing competing moneyed capital, he did so with the intention that the taxes would be so collected at the five-mill levy by the county treasurer's office, and that there were no assessments on the shares of stock of any corporation in the city of Des Moines during the years 1919 to 1922, other than the shares of banks and trust companies which were taxed at a rate in excess of five mills on the dollar, nor was there any moneyed capital, whether in the hands of individuals or in the form of shares of stock of corporations, that was in fact taxed on the same basis with the shares of stock in banks and trust companies. We have heretofore pointed out that under the statutory provisions in effect at the times involved in this suit, the county treasurer was required by statute to collect the taxes as entered upon the tax lists, and the tax lists constituted his authority for such collection. And so, we say that the statement in the majority opinion of said Court is not sustained by the record.

It is true, of course, that there could be, as a result of system and design, a discrimination in the collection of taxes which would fall within the prohibitions contained in Section 5219 of the Revised Statutes of the United States, and the Fourteenth Amendment to the Constitution of the United States. But it is not true that such illegal discrimination can only result from an intentional and systematic failure on the part of the state and its political subdivisions to ultimately collect taxes from all taxpayers in the same class at the same rates. The restriction upon the power to tax the shares of petitioner, contained in Section 5219 of the Revised Statutes, and the prohibition upon the power of the state contained in the Fourteenth Amendment to the Constitution relate to the imposition of taxes as the result of an intentional, systematic, habitual, and arbitrary action of the officials of the state and its subdivisions. This discrimination results when the state or its agents are authorized to demand the sums of money as taxes pursuant to the preparation of the tax bills in accordance with the methods prescribed by statute. And that is just what happened at the time the county auditor in each of these years lodged the tax lists with the county treasurer, because without any further action on the part of any agent of the state or its political subdivisions the amounts shown on the tax lists became charges and liens, if not paid, not only against the petitioner, but against all other taxpayers for taxes levied against them. And it is merely an avoidance of the decision of the Federal rights, asserted in this instance, upon an untenable ground to say that when

the petitioner was subjected to the charge or charges in each of these years by the lodging of the tax lists with the county treasurer, and when the other taxpayers employing competing moneyed capital were subjected to the grossly discriminatory taxes in each of these years by the lodging of the tax lists with the county treasurer, that the rights of the petitioner arising under the Federal laws and the Federal Constitution were not then and there infringed by virtue of the acts of the officials of the state and its subdivision so as to give to the petitioner the right to the relief claimed.

We have heretofore called to the Court's attention the decision of the Circuit Court of Appeals of the Eighth Judicial Circuit in the case of Munn *v.* Des Moines National Bank, particularly with respect to its binding effect upon the Supreme Court of Iowa. There were involved in that case Federal questions. The decision of the Circuit Court of Appeals became final, since no effort was made to procure a review thereof by this Court. The Supreme Court of Iowa in Des Moines National Bank *v.* Fairweather, 191 Iowa at p. 1244, expressly recognizes the binding effect of such a final decision upon a Federal question.

But we desire the Court to consider the effect of the judgment in the case of Munn *v.* Des Moines National Bank *et al.*, *supra*, from another aspect. That case, as we have shown, involved the taxation of the shares of stock of the Des Moines National Bank, the Bankers Trust Company, and the Iowa Loan and Trust Company, during the years 1919 to 1922 inclusive, which are the same years as are involved in this case. Each

of those institutions was engaged in the commercial banking business in Des Moines, Iowa, the location of the business of petitioner. There were involved in those cases Federal questions, namely: the violation through the method of taxation employed by the taxing officials of the State of Iowa and its political subdivisions of the provisions of Section 5219 of the Revised Statutes of the United States, and of the constitutional rights of the plaintiffs in those cases. These Federal questions were resolved in favor of the plaintiff banks in those cases, and the decision of those cases is a finality. So final was the decision that the taxes which were ultimately exacted from the plaintiffs therein was at the rate of only five mills on the dollar of assessed valuation in each of the years involved. There can be no question of the right of the Federal courts to have decided the Federal questions presented by those cases, nor of the fact that the Federal courts of final resort did decide those questions, and the decision was in favor of the plaintiff banks, who were direct active banking competitors of the petitioner. The decision and judgment in those cases became binding upon the parties thereto and upon everyone else, for that judgment, being a finality, could not be further reviewed. So here we have the taxation in the years 1919 to 1922 inclusive of the shares of stock of a national and two state banks which were in direct banking competition with the appellants at the rate of five mills on the dollar of assessed valuation. True, this taxation was influenced by and the result of the final decision of the United States Courts, but it was none the less real and this does not alter

the fact that shares of stock of competing banks in Des Moines were taxed at five mills on the dollar in the years involved in this suit, nor was such result any more brought about by the decision of a Federal question than was the result of the application of the decision of Home Savings Bank *v.* Des Moines, 205 U. S. 503, to the case of First National Bank of Estherville *v.* City Council, 150 Iowa 95, where it was held that the holding in the former case was final and conclusive in the latter because it was the final decision of a Federal right by the United States Courts. Such being the state of the law as announced by these decisions, and such being the facts as to which there can be no dispute, we insist that petitioner was entitled to the relief sought.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the errors committed by the Supreme Court of Iowa in rendering its decision and judgment may be corrected, and that petitioner may have the benefit of the rights to which it is entitled under the laws and Constitution of the United States, and that to such an end a writ of certiorari should be granted and this Court should review the decision of the Supreme Court of Iowa, and finally reverse it.

Respectfully submitted,

J. G. GAMBLE,
A. B. HOWLAND,
Attorneys for Petitioner.

APPENDIX.

The following are the statutes of Iowa so far as material to this appeal, involving the procedure as to the assessment and collection of taxes.

Section 1310, 1913 Supplement.

MONEYS — CREDITS — ANNUITIES — BANK NOTES — STOCK.—Moneys, credits and corporation shares or stocks, except as otherwise provided, cash, circulating notes of national banking associations, and United States legal tender notes, and other notes, and certificates of the United States payable on demand, and circulating or intended to circulate as currency, notes, including those secured by mortgage, accounts, contracts for cash or labor, bills of exchange, judgments, choses in action, liens of any kind, securities, debentures, bonds other than those of the United States, annuities, and corporation shares or stocks not otherwise taxed in kind, shall be assessed, and, excepting shares of stock of national, state and savings banks and loan and trust companies, and moneyed capital as hereinafter defined, shall be taxed upon the uniform basis throughout the state of five mills on the dollar of actual valuation, same to be assessed and collected where the owner resides. The millage tax here provided for shall be in lieu of all other taxes upon moneys and credits and shall be levied by the board of supervisors, placed upon the tax list and collected by the county treasurer, and the amount collected in the various taxing districts of the state shall be divided between the various funds upon the same *pro rata* basis as other taxes collected in such taxing district are apportioned. All moneyed capital within the

meaning of section fifty-two hundred-nineteen of the revised statutes of the United States shall be listed and assessed against the owner thereof at his place of business, and if a corporation at its principal place of business, at the same rate as state, savings, national bank and loan and trust company stock is taxed, in the same taxing district, and at the actual value of the moneyed capital so invested. The person or corporation using moneyed capital in competition with bank capital shall furnish the assessor upon demand a full and complete itemized sworn statement showing the amount of moneyed capital so used.

Section 1322, 1913 Supplement.

NATIONAL, STATE AND SAVINGS BANKS—REFUSAL TO COMPLY WITH STATUTE—PENALTY.—Section thirteen hundred twenty-two of the supplement to the code, 1907, is hereby repealed and the following enacted in lieu thereof:

"Shares of stock of national banks and state and savings banks, and loan and trust companies, located in this state, shall be assessed to the individual stockholders at the place where the bank or loan and trust company is located. At the time the assessment is made the officers of national banks and state and savings banks and loan and trust companies shall furnish the assessor with lists of all the stockholders and the number of shares owned by each, and the assessor shall list to each stockholder under the head of corporation stock the total value of such shares. To aid the assessor in fixing the value of such shares, the said corporation shall furnish him a verified statement of all the matter provided in section thirteen hundred twenty-one of the supplement to the code, 1907, which shall also show separately the amount of the capital

stock and the surplus and undivided earnings, and the assessor from such statement shall fix the value of such stock based upon the capital, surplus, and undivided earnings. In arriving at the total value of the shares of stock of such corporations, the amount of their capital actually invested in real estate owned by them and in the shares of stock of corporations owning only the real estate (inclusive of leasehold interests, if any,) on or in which the bank or trust company is located, shall be deducted from the real value of such shares, and such real estate shall be assessed as other real estate, and the property of such corporation shall not be otherwise assessed. A refusal to furnish the assessor with the list of stockholders and the information required under this section shall be deemed a misdemeanor, and any bank or officer thereof so refusing shall be punished by a fine not exceeding five hundred dollars."

Section 1322-1a, 1913 Supplement.

BANK STOCKS—MONEYED CAPITAL—TAXABLE VALUE. —For the purpose of placing the taxation of bank and loan and trust company stock and moneyed capital as nearly as possible upon a taxable value relatively equal to the taxable value at which other property is now actually assessed throughout the state as compared with the actual value thereof, it is hereby provided that state, savings and national bank stock and loan and trust company stock and moneyed capital shall be assessed and taxed upon the taxable value of twenty per cent of the actual value thereof, determined as herein provided, which twenty per cent of the actual value shall be taken and considered as the taxable value and shall be taxed as other property in such taxing district.

Section 1383, 1913 Supplement.

TAX LIST.—All taxes, except road taxes, which are uniform throughout any township or school district shall be formed into a single tax, and entered upon the tax list in a single column, to be known as a consolidated tax, and each receipt shall show the percentage levied for each separate fund. Before the first day of January in each year, the county auditor shall transcribe the assessments of the several townships, towns or cities into a book, to be provided at the expense of the county for that purpose, to be known as the tax list, properly ruled and headed, with distinct columns, in which shall be entered the names of taxpayers, descriptions of lands, number of acres and value, number of town lots and value, value of personal property and each description of tax, with a column for polls and one for payments, and shall complete the same by carrying out the totals and footings of columns. At the end of the list of each township, town or city he shall make an abstract theerof, and apportion the consolidated tax among the respective funds to which it belongs, according to the number of mills levied for each.

Section 1385-b, 1913 Supplement.

ERRORS CORRECTED—OMITTED PROPERTY.—The auditor may correct any error in the assessment or tax list, and may assess and list for taxation any omitted property; but before assessing and listing for taxation any omitted property he shall notify by registered letter the person, firm, corporation, or administrator, or other person in whose name the property is taxed, to appear before him at his office within ten days from the time of said notice and show cause, if any there be, why such correction or assessment

should not be made, and should such party feel aggrieved at the action of said auditor he shall have the right of appeal therefrom to the district court. And if such correction or assessment is made after the books have passed into the hands of the treasurer he shall be charged or credited therefor as the case may be. All expense incurred in the making of said correction or assessment shall be borne *pro rata* by the funds which are affected by said correction and the proceedings to be reported to the board of supervisors.

Code of Iowa, 1897, Sec. 1387.

TAX LIST DELIVERED.—He (County Auditor) shall make an entry upon the tax list showing what it is, for what county and year, and deliver it to the county treasurer on or before the thirty-first day of December, taking his receipt therefor; and such list shall be a sufficient authority for the treasurer to collect the taxes therein levied. But no informality therein, and no delay in delivering the same after the time above specified, shall affect the validity of any taxes, sales, or other proceedings for the collection of such taxes.

Code of Iowa, 1897, Sec. 1390.

TREASURER TO COLLECT.—The treasurer, after making the entry, shall proceed to collect the taxes, and the list shall be his authority and justification against any illegality in the proceedings prior to receiving the list; and he is also authorized and required to collect, as far as practicable, the taxes remaining unpaid on the tax books of previous years.

Code of Iowa, 1897, Sec. 1396.

INFORMATION AS TO TAXES DUE.—The treasurer, when applied to by letter and receiving thirty cents in pos-

age stamps or money, and ten cents additional for each tract of one hundred and sixty acres in excess of three hundred and twenty acres, in no case to exceed fifty cents, shall correctly answer the same by mail, giving the amount and interest of unpaid taxes and of any tax sales thereof as the same appear upon the tax list in his office, and upon the return of the letter or a copy, before the last day of the current month, with the demand due as shown therein, he shall pay the taxes and forward to the sender a tax receipt without further charge.

Code of Iowa, 1897, Sec. 1397.

PENALTY.—Any treasurer who shall neglect for twenty days after the receipt of any such letter, with money or stamps inclosed as aforesaid, to answer the same fully as required in the preceding section, or who shall directly or indirectly receive or be concerned in receiving any greater compensation for the service mentioned than as above provided, shall forfeit to the person aggrieved, for each offense, the sum of fifty dollars, which may be recovered in a civil action.

Code of Iowa, 1897.

SECTION 1417. REFUNDING ERRONEOUS TAX.—The board of supervisors shall direct the treasurer to refund to the taxpayer any tax or portion thereof found to have been erroneously or illegally exacted or paid, with all interest and costs actually paid thereon. In case any real estate subject to taxation shall be sold for the payment of such erroneous tax, interest or costs, the error or irregularity in the tax may be corrected at any time provided in this chapter but such correction shall not affect the validity of the sale or the right or title conveyed by a treasurer's deed, if

the property was subject to taxation for any of the purposes for which any portion of the taxes for which the land was sold was levied, and the taxes were not paid before the sale, or the property redeemed from sale.

(Laws of the Thirty-seventh General Assembly.)

CHAPTER 343.

TAXATION.

SECTION 1. Rate of taxation—adjusted taxable value. That hereafter in all taxing districts in the state, including townships, school districts, cities, towns and counties, when by law then existing the people are authorized to determine by vote, or officers are authorized to estimate or determine, a rate of taxation required for any public purpose, such rate shall in all cases be estimated and based upon the adjusted taxable valuation of such taxing district for the preceding calendar year.

SECTION 2. Amounts certified in dollars, not by rate. That when any authorized tax rate within any taxing district of the state, including townships, school districts, cities, towns and counties, shall have been thus determined as provided by law, the officer or officers charged with the duty of certifying said authorized rate to the county auditor or board of supervisors, shall, before certifying the same, compute upon the adjusted taxable valuation of such taxing district for the preceding calendar year (not including moneys and credits and other moneyed capital taxed at a flat rate, as provided in section thirteen hundred ten (1310) supplement to the code, 1913), the amount of tax said rate will raise, stated in dollars, and shall certify said computed amount in dollars, and not by rate, to the county auditor and board of supervisors.

SECTION 3. Computation of rate. When the valuations for the several taxing districts shall have been adjusted by the several boards, as provided by law, for the current year, the county auditor shall thereupon compute and spread upon the records such a rate, not exceeding the rate authorized by law, on said adjusted taxable valuations for the current year (not including moneys and credits and other moneyed capital, taxed at a flat rate, as provided in section thirteen hundred ten (1310), supplement to the code, (1913) as shall raise the amount required for each taxing district within the county, as theretofore determined under the provisions of this act, and no larger amount; provided, however, that if in adjusting the rate to be levied in any taxing district to conform to this act, such rate shall make necessary the levying of a fraction of a mill in excess of one-half of one-tenth of a mill, said fractional excess may be computed as one-tenth of a mill, which latter shall be the smallest required to be spread upon the tax lists for any purpose except rates applicable to state purpose, provided, however, that nothing herein shall be construed as interfering with the right of any taxing district to receive its due proportion of the taxes on moneys and credits and other moneyed capital taxed at a flat rate as provided in section thirteen hundred ten (1310), supplement to the code, 1913.

SECTION 4. Record of rates. On the determination by the auditor of the necessary rates as herein directed, it is made his duty to enter a record of such rates for each taxing district upon the permanent records of his office in a book to be kept for that purpose.

FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1931.

~~1930 Term No. 711~~

1931 Term No. 15

IOWA-DES MOINES NATIONAL BANK,
Petitioner,

vs.

E. R. BENNETT, Chairman of the Board of Supervisors of Polk County, Iowa, et al., *Respondents.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA.

BRIEF OF PETITIONER.

J. G. GAMBLE,
A. B. HOWLAND,
500 Bankers Trust Bldg.,
Des Moines, Iowa,
Counsel for Petitioner.

INDEX.

Appendix 84
Argument 37
Specification of Errors 28
Statement of the Case 4
The Issues 4
Taxation of Bank Capital 8
Existence and Taxation of Moneyed Capital 11
Banking Business of Petitioner 22
Prior Adjudication in Munn v. Des Moines Nat'l Bank 24
Iowa Supreme Court Decision 26
Summary of Argument 31
I. The record shows a clear discrimination against the shares of petitioner and in favor of moneyed capital prohibited by Sec. 5219 of the Revised Statutes of the United States 31
II. The record discloses that the Laws of Iowa were deliberately, systematically and habitually administered by the officers of the State and its subdivisions so as to produce a discrimination against the shares of petitioner and in favor of other moneyed capital prohibited by the terms of Sec. 5219 of the Revised Statutes of the U. S. and in violation of the restrictions imposed by the 14th Amendment 32
III. The determination by the Iowa Supreme Court that the acts of the county auditor were not binding on the State is clearly untenable 33
IV. There is neither pleading nor proof that the taxing officers of the State have undertaken or can now collect taxes upon moneyed capital so as to remove the discrimination 34
V. The evidence discloses that the taxes involved were exacted of petitioner by compulsion and under duress. The petitioner has a federal right to have such illegal taxes refunded to it and this federal right was denied by the decision of the Iowa Supreme Court 34
VI. By the prior decisions of the Iowa Supreme Court the Board of Review was without jurisdiction to assess the shares of petitioner as "moneys and credits". Resort to the Board of Review would therefore have been futile and the laws of Iowa deny petitioner the equal protection of the law and due process of law in violation of the 14th Amendment 35
VII. The decision in the case of Munn v. Des Moines Nat'l Bank 18 Fed. (2) 269 by the Circuit Court of Appeals for the 8th Circuit was binding upon the courts of Iowa and required that the shares of petitioner be accorded taxation at the same rates as the shares of the banks involved in the Munn case 36
VII-A. The identical cause of action involved in this case was determined by the Circuit Court of Appeals for the 8th Circuit in Munn v. Des Moines Nat'l Bank and the adjudication in the Munn case is binding upon the respondents 37

INDEX TO CASES CITED.

Amoskeag Savings Bank v. Purdy, 231 U. S. 373 31
Avoca State Bank v. Burke, Co. Auditor, 193 Iowa 1055 63
Boyer v. Boyer, 113 U. S. 689 31-33
Cannon v. Nelson, 83 Iowa 242 80
Carpenter v. Shaw, 280 U. S. 363 35-59-76
Central of Georgia R. R. Co. v. Wright, 207 U. S. 127 36
C. & N. W. R. Co. v. Osborne, 265 U. S. 14 32-45
Cummings v. Merchants Nat'l Bank, 101 U. S. 153 32-45-49
Des Moines Nat'l Bank v. Des Moines, 153 Iowa 336 36

Des Moines Nat'l Bank v. Fairweather, et al., 191 Iowa 1240; 263 U. S. 103 ____ 10-36-79
Eddy, Co. Treas. v. First Nat'l Bank of Fargo, 275 Fed. 550 (C. C. A. 8th Cir.) ____ 31
Evansville Nat'l Bank v. Britton, 105 U. S. 322 ____ 31-34
First Nat'l Bank v. Chapman, 173 U. S. 205 ____ 31
First Nat'l Bank v. City of Council Bluffs, 133 Iowa 107 ____ 69
First Nat'l Bank of Council Bluffs v. Burke, Co. Aud., 196 N. W. 287 ____ 64
First Nat'l Bank of Estherville v. City Council, 150 Iowa 95 ____ 36-81
First Nat'l Bank of Guthrie Center v. Anderson, 269 U. S. 341 ____ 31-34-37-39
First Nat'l Bank of Hartford v. City of Hartford, 273 U. S. 548 ____ 31-40
First Nat'l Bank of Remsen v. Hayes, Co. Auditor, 186 Iowa 892 ____ 62
Fort Madison Security Co. v. Maxwell, 202 Iowa 1346 ____ 54
Greene v. L. & I. Ry. Co., 244 U. S. 499 ____ 32-45-60
Home Savings Bank v. Des Moines, 205 U. S. 503 ____ 57-81
Illinois Central R. Co. v. Greene, 244 U. S. 555 ____ 32
Iowa Central Ry. Co. v. Bd. of Review, 176 Iowa 131 ____ 32
L. & N. Rd. Co. v. Greene, 244 U. S. 522 ____ 32
Mercantile Nat'l Bank v. New York, 121 U. S. 138 ____ 31-39
Merchants & Mfgs. Nat'l Bank v. Penn., 167 U. S. 461 ____ 31
Merchants Nat'l Bank of Richmond v. Richmond, 256 U. S. 635 ____ 31-34
Minnesota v. First Nat'l Bank of St. Paul, 273 U. S. 561 ____ 31
Montana Nat'l Bank v. Yellowstone Co., 276 U. S. 499 ____ 34-57-65-66
Munn v. Des Moines Nat'l Bank, 18 Fed. (2) 269, (C. C. A. 8th Cir.) ____ 24-25-30-31-32-35-36-37-70-78-80
Munn v. Bankers Trust Co., 18 Fed. (2) 269 ____ 30
Northwestern Bank of Ireton v. Van Roekel, 202 Iowa 237 ____ 54
Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287 ____ 36
People, ex rel., v. Weaver, 100 U. S. 539 ____ 31-33
Raymond v. Chicago Union Traction Co., 207 U. S. 20 ____ 32-36-45
Reagan v. Farmers Loan & Trust Co., 154 U. S. 362 ____ 32-48
Sioux City Bridge Co. v. Dakota County, 260 U. S. 441 ____ 32-36-45-73
Sunday Lake Iron Co. v. Wakefield, 247 U. S. 350 ____ 32-45-49
Supervisors Albany County v. Stanley, 121 U. S. 535 ____ 31
Steele v. Madison County, 198 Iowa 902 ____ 61
Taylor v. L. & N. R. R. Co., 88 Fed. 350 ____ 75
Turner v. Wade, 254 U. S. 64 ____ 36
Ward v. Love County, 253 U. S. 17 ____ 35-60-76
Whitbeck v. Mercantile Nat'l Bank, 127 U. S. 193 ____ 31

STATUTES CITED.

Chapter 343 Laws 37th G. A. ____ 33-53—App. 91
Code of 1897, Section 1322 ____ 8
Code of 1897, Section 1385 ____ 33
Code of 1897, Section 1387 ____ 33-53—App. 89
Code of 1897, Section 1390 ____ 53—App. 89
Code of 1897, Section 1396 ____ 53—App. 89
Code of 1897, Section 1397 ____ 53—App. 90
Code of 1897, Section 1417 ____ App. 90
Code Supplement of 1913, Section 1072 ____ 33-53
Code Supplement of 1913, Section 1310 ____ 44-45—App. 84
Code Supplement of 1913, Section 1322 ____ 44-45—App. 85
Code Supplement of 1913, Section 1322-1a ____ 8-44-45—App. 86
Code Supplement of 1913, Section 1373 ____ 67—App. 86
Code Supplement of 1913, Section 1383 ____ 33-53—App. 88
Code Supplement of 1913, Section 1385-b ____ 33-53—App. 88
Code of 1927, Section 7135 ____ 67
Code of 1927, Section 7235 ____ 4-64—App. 90
Judicial Code, Section 128 ____ 37
Fourteenth Amendment to the Constitution of the U. S. ____ 28-29-32-34-35-36-45-48-49-50-56-57-59-73-76-82
Section 5219 of the Revised Statutes of the U. S. ____ 4-5-6-13-28-29-31-32-33-34-37-39-43-44-45-49-55-56-59-66-77-80-81

INDEX TO APPENDIX.

Section 1310, Code Supplement 1913 84
Section 1322, Code Supplement 1913 85
Section 1322-1a, Code Supplement 1913 86
Section 1373, Code Supplement 1913 86
Section 1383, Code Supplement 1913 86
Section 1385-b, Code Supplement 1913 88
Code of Iowa, 1897, Section 1387 88
Section 1390, Code of 1897 89
Section 1396, Code of 1897 89
Section 1397, Code of 1897 89
Section 1417, Code of 1897 (Code of 1927, Sec. 7235) 90
Laws of 37th General Assembly, Chapter 343 91

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 711

IOWA-DES MOINES NATIONAL BANK,
Petitioner,

vs.

J. M. STEWART, *et al., Respondents.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA.

BRIEF OF PETITIONER.

THE OPINION OF THE COURT BELOW

The opinion of the Supreme Court of Iowa was by a divided court and was rendered on September 26, 1930, and the majority opinion appears in the printed record at page 1340; the dissenting opinion at page 1358. The case has not been officially reported, but appears in 232 Northwestern Reporter, 445.

On December 8, 1930, application was made to Justice Butler of this Court for an order extending the time for filing petition for Writ of Certiorari, and on the same day an order was entered extending such time for 60 days from that date. The petition was duly filed within the time thus allowed and the Writ was granted on March 16th, 1931.

STATEMENT OF THE CASE.

THE ISSUES.

The petitioner, a national bank, commenced this action in mandamus in the district court of Polk County, Iowa, seeking a writ commanding the respondents in their respective capacities as members of the Board of Supervisors and County Auditor and County Treasurer of said County (proper substitution of successors in office during the pendency of the action having been made) to refund to petitioner certain taxes and penalties thereon exacted of petitioner by the taxing officers of the County in the years 1919 to 1922 inclusive. The form of the action is one authorized by the Statutes of Iowa in force at the time and now included in the Code of Iowa, 1927, as Section 7235.

The basis of the action was:

First, that the shares of stock of petitioner were subjected to taxation in the years referred to at rates from five to seven times greater than were imposed upon other moneyed capital in the hands of individual citizens in the same taxing district for the same taxing years, thus violating the provisions of Section 5219 of the Revised Statutes of the United States.

Second, that the taxing officials of the State of Iowa, County of Polk and City of Des Moines, intentionally, habitually, systematically, and arbitrarily in each of the years 1919 to 1922, inclusive, imposed taxes upon large amounts of moneyed capital employed in competition with petitioner at rates grossly discriminatory, as compared with the rates and taxes imposed upon shares of stock of petitioner, thereby not only infringing the provisions of Section 5219 of the Revised Statutes of the United States, but as well the provisions of the Fourteenth Amendment to the Constitution of the United States, which provides that no state shall deny

to any person within its jurisdiction the equal protection of the law.

Third, that by the statutes of the State of Iowa it was expressly provided that shares of stock of national, state, and savings banks and trust companies, and "other moneyed capital within the meaning of Section 5219 of the Revised Statutes of the United States," should be subjected to taxation at a rate equaling the consolidated levy, compiled under the laws of Iowa after a determination of the needs of each taxing district of the state, applied to one-fifth (1/5) of the actual valuation of such shares of stock. Such statutes also expressly provided that moneys and credits, not including shares of stock in national, state, and savings banks and trust companies, and other moneyed capital within the meaning of Section 5219 of the Revised Statutes of the United States, should be taxed at a rate of five mills on the dollar of actual valuation, but notwithstanding the provisions of said statute, the taxing officials charged with the administration of such laws, or some of them, habitually, intentionally, systematically, and arbitrarily subjected the shares of stock of petitioner to taxation at the consolidated levy rate in each of the years 1919 to 1922, inclusive, and at the same times subjected large amounts of other moneyed capital within the meaning of Section 5219 of the Revised Statutes of the United States to taxation at but five mills upon the dollar of actual valuation, thereby subjecting the shares of stock of petitioner to taxation in said years at a rate from five to seven times that imposed upon such other moneyed capital.

That the county treasurer of Polk County, Iowa, the collecting agent of taxes for the State of Iowa and all of its political subdivisions, demanded of the petitioner that it pay taxes upon its shares at the said consolidated levy rate, together with interest and penalties thereon, and threatened to enforce collection of said taxes, interest, and penalties by seizure and sale of plaintiff's property; that in order to pre-

vent the sale of its property and the accumulation of penalties, the petitioner, on November 30, 1923, under written protest, paid to the said treasurer the following amounts, to-wit:

Year.	For taxes.	For penalties.
1919	$55,807.62	$25,113.43
1920	64,053.64	24,340.38
1921	67,751.68	17,615.44
1922	61,341.68	4,907.33

Fourth, that in a suit instituted in the United States District Court for the Southern District of Iowa by the Des Moines National Bank, a corporation organized under the national banking laws of the United States, against the county treasurer of Polk County, Iowa, a judgment and decree was rendered enjoining the collection of taxes against the shares of stock of said Des Moines National Bank at a greater rate than five mills on the dollar of actual valuation for the years 1919 to 1922, inclusive, on account of the unconstitutional administration of the statutes of the State of Iowa by the taxing officers of the City of Des Moines and of Polk County, Iowa, and because of the violation of the restrictions upon the power to tax the shares of stock of the said Des Moines National Bank, contained in Section 5219 of the Revised Statutes of the United States. That the said county treasurer appealed from said judgment and decree. That the Board of Supervisors and the State of Iowa, by the Attorney General, and the City of Des Moines, by its corporation counsel, all appeared in said cause upon its trial in the district court, and in the appeal therefrom to the Circuit Court of Appeals of the United States for the Eighth Circuit, and participated in the presentation of the defense to said action, and bore a part of the expense of such defense. That the judgment and decree of said District Court of the United States was affirmed by the Circuit Court of Appeals, and no review thereof was sought in this Court, so that said judgment became final. That under and pursuant to said judgment, and because of

the unconstitutional and unlawful acts of the taxing officials of the same taxing district, for the same years involved in this cause as determined in said action, the shares of stock of said Des Moines National Bank were subjected to taxation at only five mills on the dollar. It was alleged that such adjudication was binding upon the respondents.

Respondents, by way of answer in said action, admitted that levies were made upon the shares of petitioner substantially as alleged, but pleaded other defenses which may be summarized as follows:

1. A denial of facts not admitted.

2. That the money paid by the petitioner in each of the years in controversy had been distributed to the various political subdivisions entitled thereto, and respondents had no money with which to make refund to petitioner if the court were to so decree.

3. The statute of limitations.

4. Laches.

5. That petitioner had a plain, speedy, and adequate remedy at law.

6. That the remedy of petitioner, if any, is by appeal from the action of the board of review.

7. The petitioner is not entitled to maintain an action in mandamus.

8. That petitioner may not recover because of a violation of the taxing statutes of Iowa by the taxing officers.

9. That the petitioner does not come into court with clean hands, in that during the years in controversy the plaintiff, through its officers and agents, assisted and aided other taxpayers in evading taxation in Polk County, Iowa, and elsewhere.

10. That petitioner may not maintain an action to procure refunds of taxes upon its shares of stock, even though paid by it, because it is not the proper party to maintain such action.

11. That the district court was without jurisdiction to grant the relief prayed, for it affirmatively appeared, that, after the institution of the action, the Board of Supervisors had denied the claim, and that such action constituted a judicial determination and finding, which cannot be collaterally attacked in a mandamus action, and that petitioner's remedy, if any, was by certiorari and not by mandamus.

12. That there was no adjudication in the action in the United States Courts, except an adjudication that the county treasurer should be enjoined from collecting certain taxes upon the shares of the Des Moines National Bank, and that the same was in no way binding upon the respondents.

Upon the trial evidence in great detail was adduced, from which the following may be discerned.

The Taxation of Bank Capital.

In January of each year petitioner made to the city assessor of the City of Des Moines, a statement as required by Section 1322, Code of 1897 and 1322-1a Code Supplement 1913. A typical statement is reproduced at record 1021. This statement disclosed the amount of the capital, surplus and undivided earnings of petitioner, and the book value of its real estate. In each year the city assessor made one assessment in a lump sum to the stockholders of petitioner for all its shares and entered the same under the head "corporation stock" on form No. 1 of the assessment rolls. The form used in making such assessments is shown by Exhibit No. 1449 reproduced at Record 1023. The City Council of each city is by statute constituted a local Board of Review to adjust the assessments and supervise the work of the assessor. The City Council of Des Moines sitting as a Board of Review adjourned *sine die* on April 30, 1919 for that year; on May 1, 1920 for that year; on April 30, 1921 for that year; and on May 6, 1922 for that year. See Record 581-582.

After the Board of Review had met and adjourned, the assessments upon petitioner's shares were copied into books designated as Assessor's District Books as "corporation stock" and certified by the city assessor to the County Auditor in that form. A typical page of the assessor's district books is reproduced at Record 1025. The duty of compiling the tax list was by statute delegated to the county auditor. The county auditor pursuant to statute applied the consolidated tax for state, city, county and school purposes to twenty per cents of the assessed value of the shares of petitioner, and certified the tax list to the county treasurer for collection on December 31st of each year. The tax list was not made up and completed until after the millage rates for state, county, city and school purposes was known. The millage for state purposes was fixed by resolution of the State Executive Council in August of each year. (R. 588-589.) The millage for county purposes was fixed by the Board of Supervisors in September of each year. (R. 588-589.) The amount of revenue necessary to be raised for school purposes was fixed by the Board of Directors of the Independent School District in dollars, in July of each year and certified in that form to the county auditor, whose duty it was to compute the millage rate necessary to raise the amount so certified. (R. 588-589.) The amount necessary for municipal purposes was similarly fixed by the City Council of the City of Des Moines in August or September of each year. (R. 588-589.)

The consolidated tax applied to twenty per cent (20%) of the assessed value of petitioner's shares during the four years was as follows:

1919 — 137.8 mills
1920 — 157 "
1921 — 164 "
1922 — 160.4 "

The amount of banking capital represented by shares of stock in national banks and state banks and trust companies which was subjected to taxation in the City of Des Moines during each of the four years was as follows:

	1919	1920	1921	1922
National Banks	$3,099,205	$3,276,168	$3,587,657	$3,485,535
State Banks and Trust Companies	4,519,134	4,634,356	6,320,367	6,086,481

(See Record 750.)

Between 1919 and 1923 litigation was pending involving the right of state and national banks to deduct from the assessed value of their shares of stock, the par value of tax-exempt United States bonds and securities owned by the bank. This litigation was ultimately determined adversely to the banks. See *Des Moines National Bank v. Fairweather, et al.*, 191 Iowa 1240; 263 U. S. 103.

On November 28, 1923, petitioner offered to pay the county treasurer the amount of taxes upon the assessed value of its shares for the years in question, computed at the rate of five mills on the dollar, with interest. On November 30, 1923, the petitioner, pursuant to demand of the delinquent tax collector (which included the threat to proceed by distress and sale of petitioner's property for the collection of said taxes and additional penalties), paid taxes and penalties as hereinbefore set forth, and at the time of said payment filed with the county treasurer its protest in writing. (R. 19.) Petitioner filed with the county auditor its claim for refund of the taxes and penalties so paid, on September 14, 1925, and the board of supervisors on July 15, 1927, but after the institution of this action, denied said claim for refund (R. 557). The county treasurer, after the filing of the petitioner's claim, remitted funds to the Treasurer of State, to the City Treasurer of Des Moines, to the Treasurer of the Independent

School District, and also retained funds for county purposes in the following amounts:

Year	To Treasurer of State.	City Treasurer.	School Treasurer.	County.
1926	$502,103.00	$2,724,250	$2,972,351	$1,333,597
1927 (11 mo.)	488,715.00	2,743,833	2,880,859	1,171,223

(R. 700.)

And the amount of money to be collected in Des Moines in 1928, as shown by the tax lists at the time of the trial was:

State	$ 424,295
County	1,197,457
City	2,737,872
School	3,038,901
Soldiers' Bonus (State)	32,003
Moneys and Credits	160,010

(R. 701, 824.)

The Existence and Taxation of Moneyed Capital.

The testimony with respect to the quantity, ownership, and use of moneyed capital was necessarily voluminous. The petitioner called approximately two hundred witnesses to testify with respect to the business carried on by numerous corporations, copartnerships and individuals engaged in various phases of the loan and investment business in the City of Des Moines. The evidence may be more readily understood if treated by classes. We shall therefore consider the evidence in the following classes:

A—"moneyed capital" consisting of shares of stock of domestic corporations engaged in the loan and investment business, which were assessed by the assessor and board of review as "corporation stock", on form No. 1 of the assessment roll, and certified to the auditor in that form but which were placed on the tax list as "moneys and credits" and subjected to a tax of but five (5) mills on the dollar.

B—"moneyed capital" employed by non-resident corporations, copartnerships and individuals engaged in loaning money on automobiles, cattle, and chattel security, and in discounting notes and commercial paper, assessed as "moneys and credits" and taxed at five (5) mills on the dollar.

C—"moneyed capital" employed by individuals in making loans for investment, and in notes, bonds and securities, assessed as "moneys and credits" and taxed at five (5) mills on the dollar.

"A".

During the four years in question, the shares of twenty-seven corporations, organized under the laws of Iowa and engaged in various phases of the loan business in the City of Des Moines, were assessed by the city assessor as "corporation stock" on form No. 1 of the assessment roll. Typical of such assessments is the 1919 assessment roll upon the shares of the Security Loan & Investment Company reproduced at R. 1015. The assessments upon the shares of these corporations were confirmed by the Board of Review in each of the years as "corporation stock", and were certified to the County Auditor in that form.

The County Auditor in making up the tax lists placed the assessments upon the shares of these corporations in the column "moneys and credits" and intentionally and uniformly applied thereto a tax at the rate of but five mills on the dollar. For convenience we have tabulated the assessments upon the shares of such corporations as shown by the evidence, showing the name of each corporation, together with the value of the shares assessed as "corporation stock" in each year which were taxed at five mills on the dollar:

Name of corporation	1919	1920	1921	1922
Security L. & Inv. Co.	$84,619	$64,010	$109,980	$133,904
Central Ia. Jt. St. L. Bk.		243,690	217,269	253,619
Iowa Inv. & Mtg. Co.	30,705	42,305	47,560	52,600
Des Moines Morris Plan Co.	96,433	102,044	100,302	100,000
Continental Sec. Co.	46,384	42,837	73,641	90,083
Garner Inv. Co.		51,495	56,690	20,000
Jesse F. Stevenson Co.	33,632	34,069	31,100	30,500
Farmers Bond & Mtg. Co.			152,489	120,366
Union Mtg. & Cat. L. Co.		214,399	1,044,797	950,435
Bond & Mtg. Co. of Ia.	36,770	290,163	233,580	247,593
Manning-Martin Co.	4,242	16,045	30,170	21,550
D. M. Jt. Stk. Ld. Bk.		247,124	217,700	214,106
1st & 2nd Mtg. Corp.	771,376	864,305	520,530	486,773
Com. Bldg. & Sec. Co.			57,321	104,305
Cont. Mtg. & Loan Co.			31,051	
D. M. Discount Co.			4,276	7,333
Bankers Mtg. Co.	602,270	1,486,815	933,290	897,996
Liberty Investment Co.			770,582	771,612
United Mtg. & Loan Co.	10,762	11,175	11,798	11,526
Merchants L. & Inv. Co.			31,450	59,474
Nat. Inv. & Fin. Co.		138,000	506,770	
Burns Bros. Co.				348,900
State Bond Co.				11,413
Polk County Mtg. Co.	32,910	25,145	28,607	9,317
Corn Belt Land & Loan Co.	4,114			
Guaranty Mtg. & Fin. Corp.	68,235	610,922	945,530	936,574
United Cattle L. & L. S. Co.		500,000	696,547	805,547
Total Assessments	$1,822,452	$4,984,543	$6,813,030	$6,685,526

Since it is conceded by the majority opinion of the Iowa Supreme Court that the shares of these corporations constituted a relatively material amount of moneyed capital within the meaning of Section 5219 of the Revised Statutes of the United States, we shall not burden this Court with a detailed recital of the evidence as to the business carried on by each of the competing corporations but will briefly refer to the record pages where the evidence with respect thereto may be found.

Two of these corporations, the shares of which were originally assessed as "corporation stock", but which were subse-

quently placed on the tax list and taxed at the five-mill rate, were Joint Stock Land Banks, organized under the Act of Congress, engaged in making loans on farm lands within the State of Iowa.

Central Iowa Joint Stock Land Bank. (R. 220, 222, 224.)

Des Moines Joint Stock Land Bank. (R. 312-316.)

Fifteen of such corporations made, sold and discounted loans secured by first mortgage liens on Iowa real estate, both farm lands and city property.

Security Loan & Investment Co. (R. 197-203.)

Iowa Investment & Mortgage Company. (R. 218.)

Continental Securities Company. (R. 257.)

Jesse F. Stevenson Company. (R. 285.)

Farmers Bond & Mortgage Company. (R. 292.)

Union Mortgage & Cattle Loan Company. (R. 300.)

Bond & Mortgage Company of Iowa. (R. 302.)

Manning Martin Company. (R. 307.)

First & Second Mortgage Corporation. (R. 313.)

Commercial Building & Securities Company. (R. 327.)

Bankers Mortgage Company. (R. 343.)

United Mortgage & Loan Company. (R. 349.)

Merchants Loan & Investment Company. (R. 350.)

National Investment & Finance Company. (R. 745.)

Guaranty Mortgage & Finance Corporation. (R. 617, 619.)

Three of these corporations financed public improvement contractors, engaged in constructing municipal improvements in cities and towns in Iowa. The corporations advanced funds to contractors to enable them to complete their contracts and received in payment of such advances,

at a discount, improvement securities issued by the municipalities. The securities were then sold to investors.

Security Loan & Investment Company. (R. 198-203.)
Continental Securities Company. (R. 258-259.)
Jesse F. Stevenson Company. (R. 286.)

Four of the corporations financed dealers in automobiles by the purchase of notes or acceptances secured by liens on motor vehicles in the possession of the dealer, or in the hands of purchasers.

Bond & Mortgage Company of Iowa. (R. 303.)
Des Moines Morris Plan Company. (R. 249.)
Continental Mortgage & Loan Company. (R. 337.)
Des Moines Discount Company. (R. 341.)

Three of the corporations made loans secured by liens on feeder cattle located in Iowa.

United Cattle Loan & Live Stock Company. (R. 742.)
National Investment & Finance Company. (R. 745.)
Union Mortgage & Cattle Loan Company. (R. 300, 319-323.)

Nine of such corporations purchased government, municipal, public utility and industrial bonds, which they resold to individual investors and institutions located in Des Moines and elsewhere:

Security Loan & Investment Company. (R. 198.)
Continental Securities Company. (R. 258.)
Garner Investment Company. (R. 266.)
Jesse F. Stevenson Company. (R. 285, 287.)
Bond & Mortgage Company of Iowa. (R. 302.)
Bankers Mortgage Company. (R. 344.)
Liberty Investment Company. (R. 160.)

Burns Brothers Company. (R. 743.)
Guaranty Mortgage & Finance Corporation. (R. 617-619.

Some of the corporations made collateral loans both for their own account and for other investors (See Jesse F. Stevenson Company, R. 288); others discounted notes and acceptances secured by liens on household appliances and other personal property. (Des Moines Morris Plan Company, R. 249.) The following corporations issued and sold to investors debenture bonds secured by the deposit of mortgages, municipal bonds or other securities in the hands of trustees:

Security Loan & Investment Company. (R. 214.)
Continental Securities Company. (R. 258.)
Farmers Bond & Mortgage Company. (R. 292.)
Commercial Building & Securities Company. (R. 327.)
Bankers Mortgage Company. (R. 345.)
State Bond Company. (R. 366.)
Guaranty Mortgage & Finance Corporation. (R. 617.)

Substantially all phases of the loan and investment business were carried on in the City of Des Moines during the four years in question by these corporations.

"B".

In each of the four years certain foreign corporations, copartnerships and individuals, operating under trade names, were engaged in various phases of the loan business in the City of Des Moines. The capital actually employed by these corporations, copartnerships and individuals was assessed by the city assessor as "moneys and credits" on form No. 2

of the assessment roll and the assessments were approved by the board of review. The assessments were then placed upon the tax list as "moneys and credits" and a tax of five mills on the dollar applied thereto by the county auditor. The moneyed capital of such corporations, copartnerships and individuals as shown by the record, may be tabulated as follows:

Name of Taxpayer	1919	1920	1921	1922
Iowa Guarantee Mtg. Corp.	$54,570	$306,945	$147,423	$142,000
Federal Cattle Loan Society		85,000	861	
Bankers Loan & Inv. Co.	10,300		55,000	151,570
Motor Finance Co.			8,085	15,300
M. Aliber & Co.	13,790	8,040	17,524	12,117
Loyal Loan Co.	25,000	25,000	25,000	25,000
Capital Loan Co.	2,523		6,553	7,660
State Loan Co.	22,500			
Des Moines Loan Co.	5,780	12,283		7,368
Globe Loan Co.	2,600	3,500	5,000	7,500
Home Loan & Inv. Co.	9,200	12,400	13,400	13,557
Totals	$146,263	453,168	278,846	382,072

Six of these taxpayers were engaged in the "small loan business" which consisted of making loans not exceeding $300.00 secured by chattel mortgages on personal property, principally household furniture and automobiles. Most of these loans were payable in installments.

M. Aliber & Company. (R. 584.)
Loyal Loan Company. (R. 281.)
Capital Loan Company. (R. 653.)
State Loan Company. (R. 655.)
Des Moines Loan Company. (R. 282.)
Globe Loan Company. (R. 694.)

In 1920 the Federal Cattle Loan Society reported to the city assessor notes of $144,241, evidencing loans on feeder cattle, together with money on deposit of $17,570; bills pay-

able of $76,811 were deducted, leaving a net assessment of $85,000. (R. 159, 274.)

The Iowa Guarantee Mortgage Corporation financed dealers in automobiles by the purchase at a discount of sales contracts and trade acceptances secured by liens on automobiles in the hands of dealers or purchasers. In 1919 this Company handled a gross volume of business of $1,013,740.00; in 1920, $1,179,032.00; in 1921, $411,751.00; and in 1922, $606,-999.00. (R. 262-63.) This company issued bonds which were sold to banks and individual investors. (R. 262.) The bonds were secured by deposit of the company's collateral with the Des Moines Savings Bank & Trust Company as trustee. The Motor Finance Company was a copartnership engaged in similar business. (R. 298.)

"C".

Large numbers of individual taxpayers residing in the City of Des Moines held notes representing loans, both secured and unsecured. Numerous individuals also held notes and bonds of railroads, public utilities and industrial concerns. Assessments upon securities of this character were uniformly made on form No. 2 of the assessment roll as "moneys and credits". The good faith indebtedness of the taxpayer was deducted from the gross amount and the net assessment subjected to a tax of five (5) mills on the dollar. A large amount of evidence was introduced showing the character of such loans made or held by individual taxpayers. The net assessments upon securities of this character disclosed by the evidence during each of the years, was as follows:

1919 — $1,422,274.00
1920 — $1,768,048.00
1921 — $1,587,436.00
1922 — $1,783,765.00

The county auditor, or his deputy acting under his authority in making up the tax list in each of the four years deliberately and systematically placed all assessments upon the shares of domestic corporations engaged in the loan business under the head "moneys and credits" and applied thereto a tax at the rate of five (5) mills on the dollar. (R. 582.) The county auditor was called as a witness by petitioner and testified that the assessments upon the shares of the Jesse F. Stevenson Company were certified to him upon the assessor's district book as "corporation stock" and that in each year he deliberately and intentionally placed the same upon the tax list under the column "moneys and credits" and computed the taxes thereon at the five (5) mill rate. (See R. 236, 237, 238.) The auditor further testified:

"The method used in the assessment and the computation of taxes upon the shares of stock in Iowa corporations which were engaged in business in the City of Des Moines during the four years, 1919 to 1922, inclusive, was substantially the same as I have testified to with reference to the Jesse F. Stevenson Company as to the manner of the return upon the assessment roll; the entry of the assessment upon the assessor's book, and the entry of the same upon the tax list.

Q. Now with respect to individuals, in the year 1919 Mr. Rhoads, how were individuals, who had notes, mortgages and other evidences of indebtedness taxed upon the tax list?

A. Taxed on five mills on the dollar.

Q. Now was there in the year 1919 any individual in the taxing district of the City of Des Moines who had an assessment designated as "Moneyed Capital" which was taxed at the consolidated levy?

A. Not to my knowledge.

Q. Now with respect to the year 1919, where corporations were engaged in business in the City of Des Moines, how were the shares of stock of such corporations taxed when they were certified over on the assessor's book as "corporation stock"?

A. They were placed in the column headed "moneys and credits" and taxed at five mills on the dollar.

Q. Were the shares of stock of corporations so assessed placed on the tax list as moneyed capital, and taxed at the consolidated levy rate?

A. Not to my knowledge, no sir.

Q. During the year 1919, were there any assessments against individuals representing money loaned or invested in notes or securities, such as normally enter into the business of banking, which were taxed at more than five mills on the dollar?

A. All money assessed by the assessor in the hands of individuals was taxed at five mills on the dollar.

Q. In the year 1919, were there any notes in the hands of individuals taxed at a higher rate than five mills on the dollar?

A. Not to my knowledge, there were not. (R. 239, 240.)

* * * *

As far as I know, there was no difference between notes given, evidencing loans of money or investment of funds for the purpose of earning interest, and any other notes. They are not so listed on the tax books and I cannot tell you. There was no distinction in the method of taxation of notes of that general class and character and any other notes." (R. 240.)

* * * *

"With the exception of banks and trust companies, the taxes upon the assessments of corporation stock were computed on the basis of five mills on the dollar for the year 1919. The taxes were so computed and placed on the tax list by authority of the county auditor. That was true also of the year 1920. There were no assessments upon the shares of stock of any corporation in the City of Des Moines during the years 1919 and 1920, other than the shares of banks and trust companies, which were taxed at a rate in excess of five mills upon the dollar. The same is true of the years 1921, and 1922.

Q. Now with respect particularly to companies that were engaged in the business of making mortgage loans, investment companies and companies that were engaged in the purchase and sale of commercial paper, and similar concerns, what is the fact as to the rate at which the shares of stock of such corporations were taxed during the entire four year period?

A. They were assessed five mills on the dollar.

Q. Do you mean the five mill rate was applied to the assessed value of such shares?

A. It was.

(R. 241-242.)

When the taxes upon the shares of such corporations were put on the tax list at the five mill rate, they were put there during the two years that I was county auditor with the intention that the taxes would be so collected by the county treasurer's office; and so far as I know, that was true of the taxes that were computed and spread on the tax list during the years 1919 and 1920.

(R. 242.)

Q. Was there any moneyed capital whether in the hands of individuals, or in the form of shares of stock of corporations, that was in fact taxed upon the same basis with the shares of stock in banks and trust companies—any form of moneyed capital of any kind that was in fact taxed at the consolidated levy rate?

A. Not to my knowledge, outside of banks.

(R. 247.)

"There were no assessments against individuals in the year 1920 for notes, bonds or other evidences of indebtedness which were taxed at a higher rate than five mills on the dollar. The same is true in the years 1921 and 1922. They were all handled the same in all four years. All assessments against individuals which were returned on form No. 2 on the back of the assessment roll were taxed at the uniform rate of five mills on the dollar of valuation.

It is true that in the years 1920, 1921 and 1922, all individuals having notes, mortgages or other evidences of indebtedness representing money loaned out in any form were taxed at five mills on the dollar. Shares of stock in loan and investment companies in the years 1919, 1920, 1921 and 1922 were all taxed on the basis of five mills on the dollar. Shares of stock in corporations, other than banks and trust companies, engaged in the loan and investment business were taxed in substantially the same manner in all four years as were the shares of stock in the Jesse F. Stevenson Company. You will find that the assessed value of the shares of cor-

poration stock was placed upon the tax list under the head of "Moneys and Credits" and taxed at the moneys and credits rate of five mills on the dollar." (R. 582.)

Upon cross examination the auditor testified that in so listing the shares upon the tax list, he acted under his own interpretation that the statutes of the state gave him the right, as county auditor, to make changes, and that such changes, were made after taking the subject up with the legal advisers of the board of supervisors and county auditor. (R. 243.) The auditor also testified that during the years 1919 and 1920 the taxes upon the shares of the Security Loan & Investment Company were originally computed at the consolidated millage rate applied to twenty-five percent of the assessed value. That after the tax list had been certified to the county treasurer for collection he changed the list so as to place such shares in the column "moneys and credits" and subjected them to a tax at the five mill rate. Similar changes were made in the case of the Des Moines Joint Stock Land Bank, the Central Iowa Joint Stock Land Band and the Des Moines Morris Plan Bank for the years 1921 and 1922. (R. 229 to 235 inclusive.) The auditor testified that such changes were made so as to take such shares from the "high levy" to "moneys and credits" and to reduce the amount of the taxes upon the shares of such corporations. (R. 230.)

The Banking Business of Petitioner.

The petitioner, during the years in question, had accounts of approximately 400 banks located in Iowa, to many of which it loaned money. (R. 456.) It made loans to automobile dealers located in Des Moines and elsewhere in Iowa. (R. 457.) The loans were evidenced either by the direct unsecured obligation of the dealer, or by collateral

notes, with warehouse receipts covering cars in warehouses, or by the discount of notes given, by purchasers of automobiles, to the dealers. (R. 459.) It advanced credit to distributors of automobiles upon drafts secured by bills of lading covering cars shipped to local dealers by the distributors. (R. 459.) It discounted trade acceptances and installment notes for the purchase of apparatus or equipment, as well as trade acceptances and notes given to dealers as part of the purchase price of merchandise. (R. 460.) It discounted municipal and school district warrants. (R. 465.) It extended credit on notes secured by warehouse receipts covering various types of commodities in storage and in transit. (R. 462.) It extended credit for the purpose of providing funds for the purchase and feeding of cattle (R. 462), some of such loans being evidenced by the direct note of the borrower without chattel mortgage security (R. 463). It rediscounted for its correspondent banks notes of customers of such banks secured by chattel mortgages on cattle (R. 463). It made loans to individuals of less than $300.00, such loans in typical months averaging from 161 to 200. (R. 463.) Many of such loans were made with the expectation that they would be paid off in installments. It purchased, sold, and dealt in United States Government securities, and other bonds and securities, some of which it sold to its customers. (R. 464.) It bought bonds of Iowa municipalities, and some municipalities outside of Iowa. (R. 464.) It held industrial bonds and foreign government bonds. (R. 464.) It financed contractors engaged in public improvement work throughout the State of Iowa, and purchased, at an agreed price, public improvement certificates or bonds in which the contractors were paid. (R. 464.) It extended credit secured by mortgages on Iowa farms (R. 465), and purchased and carried real estate mortgage loans for its correspondent banks, and for insurance companies and indi-

viduals. (R. 465.) It discounted notes of companies engaged in the tire and rubber business. (R. 469.)

The petitioner offered in evidence excerpts from the annual reports of the Comptroller of the Currency, which disclosed that during the years 1919 to 1922 National Banks in Des Moines, and other cities and towns in Iowa, held substantial amounts of loans secured by mortgages on improved real estate, loans secured by warehouse receipts covering commodities in storage and in transit, and discounted acceptances and commercial paper collaterally secured by liens on merchandise, cattle, stocks, bonds and other personal property. (R. 623 to 642.) The reports of the Comptroller of the Currency also disclosed that during the four years National Banks in Des Moines, and other cities and towns in Iowa, held large amounts of United States Government bonds and notes, state, county and municipal bonds, industrial, railroad, public utility and other public service corporation bonds and notes. (R. 629, 633, 635, 636, 639, 642.)

The adjudication in Munn, county treasurer, v. Des Moines National Bank, 18 Fed. (2) 269.

During the four years in question, the Des Moines National Bank, a corporation organized under the national banking laws, the Bankers Trust Company and the Iowa Loan & Trust Company, corporations organized under the laws of Iowa, were all engaged in the banking business in Des Moines. On January 20, 1923, these banks filed bills in equity in the United States District Court for the Southern District of Iowa against the county treasurer of Polk County. These bills sought injunctions against the collection of all taxes upon the shares of stock of the plaintiffs in excess of five mills on the dollar of assessed valuation. (R. 841.) The basis for the relief sought was the same set up by petitioner in this suit. On May 5, 1925 a Special Master appointed to

hear the evidence and report his conclusions of fact and law to the Court, filed his report in which he found as follows:

> "Conclusion: It is my conclusion that moneyed capital in the hands of individual citizens of this state and living in Des Moines, Iowa, was taxed at five mills on the dollar of actual valuation, and that substantial amounts of such moneyed capital was so taxed during the years 1919, 1920, 1921 and 1922, and that it was the habitual practice of the taxing officers of Polk County to so tax moneyed capital in the hands of individuals, and that it was intentionally so done by them. That the complainants are entitled to relief and that the defendant, or his successor in office, should be enjoined from collecting or attempting to collect taxes from the complainants in excess of a sum computed at five mills on the dollar of the assessed valuation of the shares of stock of each of said complainants for the four years in question, as such sums are set forth in the table in division VII hereof, together with interest upon such sums at the rate of 6% per annum from the date they were payable." (R. 952.)

Exceptions were filed to the said report but were overruled, and a decree was entered by said court in each of said suits perpetually enjoining the collection of taxes upon the said shares at rates in excess of five mills on the dollar (R. 970 to 974, inc.). An appeal was prosecuted to the Circuit Court of Appeals for the Eighth Circuit, which upon submission affirmed the judgment of the District Court, the opinion of the Circuit Court of Appeals being dated February 28, 1927, and appears on pages 977 to 994, inclusive, of the Record. This opinion is reported in 18 Fed. (2d) 269. The board of supervisors of Polk County paid bills for reporters, witnesses', and attorneys' fees, court costs, printing bills, for appellant in said cause. (R. 741.) The shares of the Des Moines National Bank and Bankers Trust Company were ultimately taxed at but five mills on the dollar during the years involved. (R. 759.)

The Iowa Supreme Court Decision.

The action was tried in the District Court of Polk County, Iowa, which rendered a decree denying to the petitioner the relief sought without findings of fact or of law, and without an opinion by the presiding judge; petitioner perfected an appeal to the Supreme Court of the State of Iowa. The Opinion of the Iowa Court, which was concurred in by five Justices, four members of the court dissenting and filing a dissenting opinion, sets out the method of taxation applied to the shares of petitioner. Following this statement, the majority opinion says:

> "During these years *a large number of domestic corporations employing, as we shall assume, moneyed capital, in competition with plaintiffs in Des Moines in like* form made to the assessor their sworn statements. The assessor in these cases used the same classification and assessment, applied to the capital of these corporations the same basis of assessment and made up and returned to the county auditor the assessment rolls and the assessor's books in identically the same form and on the same basis as in the case of the assessments against the plaintiffs.
>
> The county auditor in some of these assessments against competing corporations fixed the taxable value at 20 per cent of the actual value and applied the consolidated levy as in the case of the plaintiffs. After the tax books had passed into the hands of the treasurer, but before payment, the county auditor changed these assessments as they appeared upon the tax books to assessments of moneys and credits and applied to them the five mill levy. As to the rest of the assessments of the competing domestic corporations the county auditor instead of entering on the tax books the assessments as taxes upon "corporate stock" and applying the consolidated levy upon 20 per cent of the valuation, extended them on the tax books as "moneys and credits" and applied the five mill levy on the dollar of actual valuation under Section 1310 and 1311, Code Supplement 1913.

During these years there were in the City of Des Moines a large number of persons and a few foreign corporations, who, as we shall assume, were employing moneyed capital in competition with plaintiffs. The assessor classified and assessed this competing capital as "moneys and credits". He made up the assessment rolls and assessor's books accordingly and returned them to the county auditor. The county auditor extended these assessments upon the tax books as "moneys and credits" and applied to them the five mill levy upon the actual net valuation." (R. 1341 and 1342.)

The majority then hold that although under the statutes of Iowa the method of assessment and taxation of the shares of petitioner was clearly defined, and mandatory upon the taxing officials, nevertheless as to the large number of individuals and corporations owning moneyed capital in substantial amounts which were assessed as "moneys and credits" and taxed at five mills upon the dollar of actual valuation, petitioner's remedy was solely by appeal from the action of the assessing bodies. As to the corporations in competition with petitioner in the taxing district in said years, the shares of stock of which were assessed as "corporation stock" but whose assessments were changed by the county auditor to "moneys and credits", and thereby subjected to a tax at but five mills on the dollar, petitioner was not entitled to the relief prayed because the county auditor acted unlawfully in making such change, notwithstanding that under the statutes of the State, he was the official to whom was remitted the power of making up the tax lists and in making up the tax lists he acted under advice of counsel for the Board of Supervisors. The opinion further holds that the acts of the county auditor being unlawful were not binding upon the State and its political subdivisions for the auditor was a mere usurper of authority; since the State was not bound by the acts of the county auditor, its right to collect taxes upon the moneyed capital at the consolidated millage rate

was not barred. This conclusion was reached by the Iowa Supreme Court notwithstanding that seven years had elapsed since the date when the last taxes upon such moneyed capital became payable, and notwithstanding the further fact that there was neither pleading nor proof that respondents had ever attempted to make collection of the taxes upon such moneyed capital except at the five mill rate, nor that they expected to attempt such collection in the future.

SPECIFICATION OF ERRORS.

Your petitioner further shows that the final decision, judgment, and decree of the Supreme Court of Iowa, affirming the judgment of the District Court of Polk County, Iowa, entered in said cause, is erroneous in the following respects:

a. Because it is thereby decided, established, and adjudged that the petitioner's shares, being shares of a national bank, may be taxed at a greater rate than is imposed upon other moneyed capital in the hands of individual citizens of said State, contrary to the provisions of Section 5219 of the Revised Statutes of the United States.

b. Because the said decision and judgment of the Supreme Court of Iowa denies to petitioner the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States, in that in the administration of the statutes of Iowa by officers of the State and its political subdivisions there was an intentional, systematic, general, and habitual method or plan of taxation whereby large and substantial amounts of other moneyed capital within the meaning of Section 5219 of the Revised Statutes of the United States were taxed at rates from one-fifth to one-seventh as much as the taxes imposed upon the assessed value of the shares of the petitioner.

c. Because by said decision and judgment the said Supreme Court of Iowa held that there was no intentional, systematic, general, and habitual method or plan of taxation in the administration of the statutes of Iowa by officers of the State and its political subdivisions, whereby large and substantial amounts of other moneyed capital within the meaning of Section 5219 of the Revised Statutes of the United States were taxed at rates from one-fifth to one-seventh as much as the taxes imposed upon the assessed value of the shares of petitioner.

d. Because by said decision and judgment the Supreme Court of Iowa held that the acts of the county auditor in making the tax list, or in making changes in the tax list, so as to subject the shares of stock of competing corporations to a tax of from one-fifth to one-seventh as much as the tax to which plaintiff's shares were subjected, were illegal and void acts of a merely ministerial or clerical officer, were a mere nullity, were the result of usurped authority, and were not the acts of the State taken through its duly constituted officers, and were not binding upon it.

e. Because the said decision and judgment of the Supreme Court of Iowa held that the "State and all of its authorized officials have acted in the utmost good faith and in accordance with the constitutional and statutory rights of petitioner."

f. Because by said decision and judgment the Supreme Court of Iowa held that there was no discrimination in the levy or assessment as between the petitioner and competing corporations, and that the State had not knowingly and wilfully discriminated in the collection of taxes.

g. Because the said decision and judgment of the Supreme Court of Iowa denied to petitioner its rights arising under the Fourteenth Amendment to the Federal Constttution and Section 5219 of the Revised Statutes of the United States upon the ground, in part, that it did not appear that

the illegal acts of the county auditor were ever called to the attention of the board of supervisors, the executive council, the department of justice, the legislature, or any of the authorities of the State who had any power of supervision or duty to enforce correction of the misfeasances of the county auditor or county treasurer.

h. Because the decision and judgment of the Supreme Court of Iowa held that it was not bound by the decision of the Circuit Court of Appeals for the Eighth Judicial Circuit in *Munn v. Des Moines National Bank* and *Munn v. Bankers Trust Company*, 18 Fed. (2d) 269, which decision became final and which decision was of the identical Federal questions and upon the identical facts involved in this case, and constituted an adjudication of the questions there decided binding upon respondents.

i. Because said decision and judgment of the Supreme Court of Iowa held that as to other moneyed capital in the hands of individuals and foreign corporations assessed by the assessor, reported by him to the board of review, approved by that board, entered upon the tax books, and so returned to the county auditor as "moneys and credits" and subjected to taxes at five mills on the dollar of assessed valuation, petitioner had an available remedy by appeal from the board of review, and that such remedy was exclusive.

SUMMARY OF ARGUMENT.

I.

The record discloses, and the opinion of the Iowa Supreme Court concedes, that large and material amounts of moneyed capital in the hands of individual citizens of the State in the taxing district were subjected to taxation at but five mills on the dollar while the shares of petitioner during the same years were taxed at rates from five to seven times greater. This constitutes a clear discrimination against the shares of petitioner, prohibited by Section 5219 of the Revised Statutes of the United States.

First National Bank of Hartford v. City of Hartford, 273 U. S. 548.
Minnesota v. First National Bank of St. Paul, 273 U. S. 561.
Merchants National Bank of Richmond v. Richmond, 256 U. S. 635.
First National Bank of Guthrie Center v. Anderson, 269 U. S. 341.
First National Bank v. Chapman, 173 U. S. 205.
Merchants & Mfgs. National Bank v. Penn., 167 U. S. 461.
Amoskeag Savings Bank v. Purdy, 231 U. S. 373.
Mercantile National Bank v. New York, 121 U. S. 138.
Boyer v. Boyer, 113 U. S. 689.
Evansville National Bank v. Britton, 105 U. S. 322.
Whitbeck v. Mercantile National Bank, 127 U. S. 193.
Supervisors Albany County v. Stanley, 121 U. S. 535.
People ex rel. v. Weaver, 100 U. S. 539.
Eddy, County Treasurer, v. First Nat'l Bk. of Fargo, 275 Fed. 550, (C. C. A. 8th Circuit).
Allen Munn, Treasurer v. Des Moines Nat'l Bank, 18 Fed. (2d) 269, (C. C. A. 8th Circuit).

II.

A tax law as it leaves the legislative hands may not be obnoxious to any challenge upon constitutional grounds, and yet the officers of the State charged with the administration of that valid tax law may so act under it in the matter of assessment or collection as to work a trespass upon the property rights of the taxpayer, prohibited by the Fourteenth Amendment to the Constitution of the United States. See *Reagan v. Farmers Loan & Trust Co.*, 154 U. S. 362.

A.

The record here discloses that the auditor in preparing the tax lists followed an intentional, systematic and uniform plan by which a gross discrimination between the shares of petitioner and the shares of competing corporations was created. The statutes as administered by the county auditor produced in this case a gross discrimination against the shares of petitioner, in violation, not only of the restriction contained in Section 5219 of the Revised Statutes of the United States, but as well a violation of Section One of the Fourteenth Amendment.

Sunday Lake Iron Co. v. Wakefield, 247 U. S. 350.
Cummings v. Merchants National Bank, 101 U. S. 153.
Greene v. L. & I. Ry. Co., 244 U. S. 499.
L. & N. Rd. Co. v. Greene, 244 U. S. 522.
Illinois Central R. Co. v. Greene, 244 U. S. 555.
Raymond v. Chicago Union Traction Co., 207 U. S. 20.
Sioux City Bridge Co v. Dakota County, 260 U. S. 441.
C. & N. W. R. Co. v. Osborne, 265 U. S. 14.
Iowa Central Ry. Co. v. Board of Review, 176 Iowa, 181.
Reagan v. Farmers Loan & Trust Co., 154 U. S. 362.
Munn, Treasurer v. Des Moines National Bank, 18 Fed. (2d) 269.

III.

The decision of the Iowa Supreme Court that the acts of the county auditor in placing the assessments upon the shares of competing corporations on the tax list as "moneys and credits" and taxing them at the five mill rate was not binding on the State, is clearly untenable. The statutes of Iowa remit to the county auditor the duty of preparing the tax lists. The statutes of the State constitute the county auditor a public official and delegate to him certain duties in connection with the imposition of taxes within the county. The State may not set up machinery for the imposition and collection of taxes, and by means of that machinery unlawfully exact taxes from petitioner, in violation of the restrictions imposed by Section 5219 of the Revised Statutes and the Constitution of the United States, and escape the obligation of making restitution by declaring that the action of the officers was not the action of the State.

Code of Iowa, Supp. 1913, Sec. 1072.
Code of 1897, Section 1387.
Section 1385.
Code Supp. 1913, Section 1383.
Code Supp. 1913, Section 1385-b.
Chapter 343 Laws 37th G. A.

Section 5219, Revised Statutes, prohibits every discrimination against the shares of national banks and in favor of a relatively material amount of other moneyed capital employed in substantial competition with national banks. This prohibition applies to discrimination arising not only through discriminatory assessments or valuations, but as well to discrimination arising from the application of discriminatory rates of taxation to the assessed values of the shares.

People v. Weaver, 100 U. S. 539.
Boyer v. Boyer, 113 U. S. 689.

Merchants National Bank v. Richmond, 256 U. S. 635.
First Nat'l Bank of Guthrie Center v. Anderson, 269 U. S. 341.
Evansville National Bank v. Britton, 105 U. S. 322.

IV.

The holding of the majority opinion of the Iowa Supreme Court that the State and its political subdivisions have the power to remove any discrimination against the shares of petitioner by enforcing payment upon the shares of competing corporations at the consolidated millage rate is without foundation in the record and denies petitioner a Federal right upon wholly untenable grounds. There is neither pleading nor proof that the taxing officers of Polk County have undertaken, or ever expect to collect further taxes upon the shares of competing corporations taxed at the five mill rate during the years 1919 to 1923 inclusive. The suggestion is purely speculative and without foundation in the record.

Montana Nat. Bank v. Yellowstone County, 276 U. S. 499.

V.

The taxes here involved were exacted of petitioner in violation of Section 5219 of the Revised Statutes of the United States and in violation of Section One of the Fourteenth Amendment. The evidence discloses that the payment was not voluntary but was made under compulsion, and to avoid seizure and sale of the property of petitioner and the accumulation of additional penalties. The petitioner therefore has a Federal right to have such illegal taxes refunded. The arbitrary denial of a refund of taxes exacted in violation of the laws and Constitution of the United States is it-

self a denial of the equal protection of the law prohibited by the Fourteenth Amendment.

Ward v. Love County, 253 U. S. 17.
Carpenter v. Shaw, 280 U. S. 363.
Munn, Treasurer v. Des Moines National Bank, 18 Fed. (2d) 269.

VI.

Under the statutes of Iowa as construed by the Supreme Court, the assessor and board of review had no power to assess the shares of petitioner as "moneys and credits". The method of assessment and taxation upon petitioner's shares was mandatory upon the assessing bodies. Resort to the board of review would therefore have been futile, and could afford petitioner no remedy as to the assessment upon its own shares. As to the moneyed capital assessed by the assessor and board of review as "moneys and credits", petitioner's only remedy would have been by way of appeal from the assessment upon each individual item of moneyed capital, which would involve the taking of several hundred separate appeals. When the laws of a State, as construed by the highest court require a taxpayer, who is discriminated against by the systematic undervaluation of other property, or improper classification thereof, to appeal from the assessments upon all other property within the taxing district, the law violates the Fourteenth Amendment to the Constitution of the United States because it denies to the aggrieved taxpayer the equal protection of the law and is equivalent to no remedy at all. The requirement of the majority opinion that petitioner's exclusive remedy as to the moneyed capital assessed as "moneys and credits" was by way of appeal from the board of review, denies petitioner the equal protection of the law and denies petitioner due process of law in contra-

vention of the Fourteenth Amendment to the Constitution of the United States.

Sioux City Bridge Co. v. Dakota County, 260 U. S. 441.

Raymond v. Chicago Union Traction Co., 207 U. S. 20.

Central of Georgia Railroad Co. v. Wright, 207 U. S. 127.

Turner v. Wade, 254 U. S. 64.

Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287.

VII.

The identical cause of action determined by the Supreme Court of Iowa was decided in the case of *Munn v. Des Moines National Bank, et al.*, 18 Fed. (2) 269. As a result of the decision in the *Munn* case, the moneyed capital represented by the shares of the Des Moines National Bank and the Bankers Trust Company was taxed at but five mills on the dollar during the years now involved. The determination of the Circuit Court of Appeals in the *Munn* case was a final judgment, since no effort was made to have it reviewed in this Court. Under these circumstances, the determination of the Federal Courts and the taxation of the shares of the Des Moines National Bank and Bankers Trust Company pursuant to such determination are binding upon the State Courts and require that the moneyed capital represented by the shares of petitioner shall be accorded taxation at the same rates.

Des Moines National Bank v. Fairweather, 191 Iowa, 1240.

First National Bank of Estherville v. City Council, 150 Iowa, 95.

Des Moines National Bank v. Des Moines, 153 Iowa, 336.

By Section 128 of the Judicial Code the Circuit Court of Appeals was invested with final jurisdiction in the case of *Munn v. Des Moines National Bank, et al.*, and its decision became final. In that case the same issues were tendered and decided as are involved in this case. The respondents in this case are in privity with the appellant Munn in the Circuit Court case. The State and its political subdivisions entered appearances, conducted the defense and paid the expenses incident to the conduct of that litigation. Under these circumstances, the adjudication in the *Munn* case is binding upon the respondents.

ARGUMENT.

I.

Petitioner is a National bank. In *First National Bank of Guthrie Center v. Anderson*, 269 U. S. 341, this court speaking by Mr. Justice Van Devanter said:

> "National banks are not merely private moneyed institutions but agencies of the United States created under its laws to promote its fiscal policies; and hence the banks, their property and their shares cannot be taxed under State authority except as Congress consents and then only in conformity with the restrictions attached to its consent."

The consent of Congress was evidenced by Section 5219 of the Revised Statutes of the United States, which during the years here involved, provided as follows:

> "Nothing herein shall prevent all the shares in any association from being included in the valuation of the

personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the legislature of each state may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions, that *the taxation shall not be at a greater rate than is assessed upon other money capital in the hands of individual citizens of such State*, and that the shares of any national banking association owned by nonresidents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county or municipal taxes, to the same extent, according to its value, as other real property is taxed." (Italics ours.)

The majority opinion of the Supreme Court of Iowa concedes that during the years in question there were relatively large and substantial amounts of moneyed capital in the hands of individual citizens the taxes upon which were computed at but five mills on the dollar. This moneyed capital consisted of two classes:

1. Stock in domestic corporations engaged in various phases of the loan and investment business in the same field in which petitioner was engaged. These shares were assessed on the identical basis as the shares of petitioner, and discrimination arose from the fact that in making up the tax lists, the county auditor of Polk County deliberately, intentionally and systematically placed all assessments upon the shares of such competing corporations under the column "moneys and credits" and applied to the assessed valuation a tax of five mills on the dollar, at the same time applying the consolidated millage tax to 20 per cent of the assessed value of petitioner's shares, thus imposing a tax upon the shares of petitioner from five to seven times greater than was imposed upon the shares of competing corporations.

2. Money in the hands of individuals, foreign corporations and copartnerships engaged in various phases of the

loan and investment business, and money in the hands of individual taxpayers representing loans and investments, all of which was assessed as "moneys and credits" and taxed at five mills on the dollar.

In view of the decision of the Court below, a recitation of the evidence which abundantly establishes the existence of moneyed capital is unnecessary. Suffice to say that the Supreme Court of Iowa could not have arrived at any other conclusion upon the record before it. This Court has defined "moneyed capital" as the term is used in Section 5219 as including "all shares of stock or other interests owned by individuals in all enterprises in which the capital employed in carrying on the business is money, and the object of the business is the making of a profit by its use as money. It includes money in the hands of individuals employed in a similar way, invested in loans or securities for the payment of money, either as an investment of a permanent character or temporary, with a view to resale or repayment and reinvestment".

See *Mercantile National Bank v. New York*, 121 U. S. 138.

In the recent case of *First National Bank of Guthrie Center v. Anderson*, 269 U. S. 341, this Court had occasion to review a decision of the Iowa Supreme Court which had denied a National bank relief from alleged discriminatory taxation. This Court in that opinion said:

> "The restriction on the taxation of the shares often has been considered by this court. The earlier decisions have been reviewed from time to time in later cases, and all, taken collectively, may be summarized as showing, so far as is material here * * *
>
> 1. The purpose of the restriction is to render it impossible for any state, in taxing the shares, to create and foster an unequal and unfriendly competition with national banks, by favoring shareholders in state banks or individuals interested in private banking or engaged in operations and investments normally common to the business of banking. *Mercantile Nat. Bank v. New York*,

121 U. S. 138, 155, 30 L. Ed. 895, 901, 7 Sup. Ct. Rep. 826; *Des Moines Nat. Bank v. Fairweather, supra,* 116 (68 L. Ed. 190, 44 Sup. Ct. Rep. 23).

2. The term "other moneyed capital" in the restriction is not intended to include all moneyed capital not invested in national bank shares, but only that which is employed in such way as to bring it into substantial competition with the business of national banks. *Mercantile Nat. Bank v. New York, supra,* 157 (30 L. Ed. 902, 7 Sup. Ct. Rep. 826); *First Nat. Bank v. Chehalis County,* 166 U. S. 440, 461, 41 L. Ed. 1069, 1078, 17 Sup. Ct. Rep. 629.

3. Moneyed capital is brought into such competition where it is invested in shares of state banks or in private banking, and also where it is employed, substantially as in the loan and investment features of banking, in making investments, by way of loan, discount or otherwise, in notes, bonds or other securities with a view to sale or repayment and reinvestment. *Mercantile Nat. Bank v. New York, supra,* 155-157 (30 L. Ed. 901, 902, 7 Sup. Ct. Rep. 826); *Palmer v. McMahon,* 133 U. S. 660, 667, 668, 33 L. Ed. 772, 775, 776, 10 Sup. Ct. Rep. 324; *Talbott v. Silver Bow County,* 139 U. S. 438, 447, 35 L. Ed. 210, 213, 11 Sup. Ct. Rep. 594.

4. The restriction is not intended to exact mathematical equality in the taxing of national bank shares and such other moneyed capital, nor to do more than require such practical equality as is reasonably attainable in view of the differing situations of such properties. But every clear discrimination against national bank shares and in favor of a relatively material part of other moneyed capital employed in substantial competition with national banks is a violation of both the letter and spirit of the restriction. *New York v. Weaver,* 100 U. S. 539, 25 L. Ed. 705; *Boyer v. Boyer,* 113 U. S. 689, 701, 28 L. Ed. 1089, 1092, 5 Sup. Ct. Rep. 706; *First Nat. Bank v. Chapman,* 173 U. S. 205, 216, 43 L. Ed. 669, 673, 19 Sup. Ct. Rep. 407."

The rule was again repeated by this court in the case of *First National Bank of Hartford v. City of Hartford,* 273 U. S. 548.

The record discloses that during the four years the as-

sessments upon the shares of competing corporations ranged from approximately $2,000,000.00 to more than $6,000,000.00; while the assessments upon moneyed capital in the hands of individuals, copartnerships and non-resident corporations in competition with petitioner varied from $1,500,000.00 to more than $2,000,000.00. The existence of large and relatively material amounts of moneyed capital in the same taxing district in competition with petitioner was thus abundantly established.

We pass next to a consideration of the question of the rate of taxation imposed upon such moneyed capital. In the statement of the case, we have with some particularity set forth the testimony of the county auditor during the years 1921 and 1922. This witness was also chief deputy in charge of the tax department of the auditor's office in the years 1919 and 1920. This witness repeatedly testified, both on direct and cross examination that all assessments of corporation stock, except assessments upon the stock of banks and trust companies, were uniformly and intentionally taxed at but five mills on the dollar. In order that the matter may not escape the attention of the court, we again set forth the following excerpts from the record.

> "With the exception of banks and trust companies the taxes upon the assessments of corporation stock were computed on the basis of five mills on the dollar for the year 1919 * * * that was true also of the year 1920. There were no assessments upon shares of stock of any corporation in the City of Des Moines during the years 1919 and 1920 other than the shares of banks and trust companies which *were taxed* at a rate in excess of five mills upon the dollar. The same is true of the years 1921 and 1922." (See R. 241.)

Continuing, the auditor testified:

> "When the taxes upon the shares of such corporations were put on the tax lists at the five mill rate, they were

put there during the two years that I was county auditor (1921 and 1922) with the intention that the taxes would be so collected by the county treasurer's office; and so far as I know that was true of the taxes that were computed and spread on the tax lists during the years 1919 and 1920." (R. 242.)

The auditor again testified:

"Shares of stock in corporations other than banks and trust companies engaged in the loan and investment business were taxed in substantially the same manner in all four years as were the shares of stock in the Jesse F. Stevenson Company. You will find that the assessed value of the shares of corporation stock was placed upon the tax lists under the head of "moneys and credits" and taxed at the moneys and credits rate of five mills on the dollar." (R. 582.)

The tax lists for each of the years involved were in evidence. The statutes required the county auditor in the preparation of the tax lists to provide a separate column showing the date of payment. Page 383 of Exhibit 261, being the tax list for 1919, is reproduced in the record as a typical example of the tax list, and shows the payment by the Security Loan and Investment Company of taxes computed on the five mill basis on March 31, 1920, and on September 30, 1920, and the payment by Jesse F. Stevenson Company of taxes computed on the five mill basis on the same dates. (R. 1027.) E. R. Bennett, one of the respondents in the case, and who was county treasurer at the time of payment testified that he had instructed his deputies and clerks to accept money for taxes as shown by the tax books whenever the amount offered was the amount shown to be due by the tax lists. (R. 727.) The county auditor testified that when he made the tax lists, and placed thereon the shares of such corporations employing competing moneyed capital, he did so with the intention that the taxes would be so collected at the five mill levy by the county treasurer's office,

and that there were no assessments on the shares of stock of any corporation in the city of Des Moines during the years 1919 to 1922, other than the shares of banks and trust companies, which were taxed at a rate in excess of five mills on the dollar, nor was there any moneyed capital, whether in the hands of individuals or in the form of shares of stock of corporations, that was in fact taxed on the same basis with the shares of stock in banks and trust companies. We have heretofore pointed out that under the statutory provisions in effect at the times involved in this suit, the county treasurer was required by statute to collect the taxes as entered upon the tax lists, and the tax lists constituted his authority for such collection.

The statement in the majority opinion of the Iowa Court that the payment of taxes by such competing capital at but five mills on the dollar is shown only by inference and mutual assumption of the parties is not sustained by the record and is clearly erroneous.

Thus the record shows that large and material amounts of moneyed capital, as such term has been defined by this court, in the hands of individual citizens of the State in the same taxing district as petitioner, were subjected to taxation at grossly discriminatory rates as compared to the rates of taxation imposed upon the shares of petitioner in each of the years involved. This condition resulted from the exercise of unwarranted power on the part of the State and its political subdivisions, because it is directly violative of the consent granted by Congress to tax the shares of petitioner, at all, such consent being evidenced by Section 5219 of the Revised Statutes. Under all of the authorities cited in paragraph I of the summary of argument, we submit petitioner was entitled to the relief asked and the Iowa Court in denying it such relief, clearly erred.

II and III.

During the years in question the statutes of Iowa required that shares of stock in national and state banks, loan and trust companies, private banks and "all moneyed capital within the meaning of Section 5219 of the Revised Statutes of the United States" should be taxed at the same rates. Sec. 1310 Code Supp. 1913, which was in force during the period in question provided as follows:

> "All moneyed capital within the meaning of Section 5219 of the Revised Statutes of the United States shall be listed and assessed against the owner thereof at his place of business, and, if a corporation, at its principal place of business, at the same rate as state, savings, national bank, and loan and trust company stock is taxed in the same taxing district and at the actual value of the moneyed capital so invested."
>
> (Section 1310, Supp. to the Code of Iowa 1913, Sec. 1322, 1322-1-a, Supp. to the Code of Iowa 1913).

It will thus be seen that the State of Iowa adopted the classification made by Congress in Section 5219 of the Revised Statutes and that the Legislature of the State contemplated uniformity in taxation between the shares of petitioner and "moneyed capital". Such plan of taxation provides uniformity between bank shares and moneyed capital, and is entirely consistent with the restrictions imposed by the Federal law.

The city assessor of Des Moines during the four years involved testified with respect to the assessment of moneyed capital in the hands of individuals as follows:

> "When it came to the assessments in the hands of individuals or partnerships of notes, bonds, mortgages, securities, or other evidences of indebtedness, the assessments were made on form No. 2 of the assessment roll. If there were moneys and credits to be taxed, the net amount to be taxed was brought forward and en-

tered on form No. 1 of the assessment roll. That was the method of assessment followed by me as city assessor and by the deputies under my direction in the assessment of notes, bonds, mortgages, evidences of indebtedness, and credits, in the hands of individuals and partnerships in these years." (R. 622.)

We have already seen that assessments upon the shares of corporations engaged in the loan and investment business within the taxing district were made upon the same basis as the assessments upon petitioner's shares and were subsequently changed by the auditor and taxed at the five mill rate.

It was the further claim of petitioner that as the result of the intentional, systematic, habitual, and arbitrary administration of the tax laws of Iowa by its officers and the officers of its political subdivisions there was a substantial discrimination in the taxation of its shares as compared to the taxation of other moneyed capital within the meaning of Section 5219 of the Revised Statutes of the United States and within the class created by Sections 1310, 1322, and 1322-1-a, Iowa Code Supplement 1913, and that thereby there had been denied to petitioner the equal protection of the law, contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States. It is firmly settled by the decisions of this Court that the purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. *Sunday Lake Iron Co. v. Wakefield*, 247 U. S. 350; *Sioux City Bridge Co. v. Dakota County*, 260 U. S. 441; *Cummings v. Merchants National Bank of Toledo*, 101 U. S. 153; *Greene v. L. & I. Railway Co.*, 244 U. S. 499; *Chicago & N. W. Ry. v. Osborne*, 265 U. S. 14; *Raymond v. Chicago Union Traction Company*, 207 U. S. 20.

Upon this phase of the case the testimony of the auditor conclusively shows that he acted intentionally and as a result of a plan or system. He testified as follows:

"There were no assessments upon the shares of stock of any corporation in the City of Des Moines during the years 1919 and 1920, other than the shares of banks and trust companies, which were *taxed at a rate in excess of five mills upon the dollar.* The same is true of the years 1921, and 1922.

Q. Now with respect particularly to companies that were engaged in the business of making mortgage loans, investment companies and companies that were engaged in the purchase and sale of commercial paper, and similar concerns, what is the fact as to the rate at which the shares of stock of such corporations were taxed during the entire four year period?

A. They were assessed five mills on the dollar.

Q. Do you mean the five mill rate was applied to the assessed value of such shares?

A. It was.

When the taxes upon the shares of such corporations were put on the tax list at the five mill rate, they were put there during the two years that I was county auditor with the *intention* that the taxes would be *so collected by the county treasurer's office;* and so far as I know, that was true of the taxes that were computed and spread on the tax list during the years 1919 and 1920."

(R. 242.)

"Q. Now with respect to the year 1919, where corporations were engaged in business in the City of Des Moines, how were the shares of stock of such corporations taxed when they were certified over on the assessor's book as "corporation stock"?

A. They were placed in the column headed "moneys and credits" and *taxed at five mills on* the dollar.

Q. Were the shares of stock of corporations so assessed placed on the tax list as moneyed capital, and taxed at the consolidated levy rate?

A. Not to my knowledge, no sir."

(R. 239.)

Some of the taxes upon the shares of competing corporations were first computed at the consolidated millage rate and in such cases the witness changed the tax list after it was made up. In each instance, the auditor testified that he knew the consolidated millage rates, and that he intended by making the changes to subject the shares of the individual corporation to a tax at but five mills on the dollar. Thus with respect to the 1919 taxes upon the shares of the Security Loan & Investment Company, the auditor says:

"Q. Did your intend by the change that you made to subject the shares of stock of this corporation to a tax of but $423.10?

A. I think it was done to change it from the high levy to moneys and credits, which it should be assessed under.

Q. Did you do it intentionally with the idea of imposing a tax of five mills on the dollar on the assessed valuation of the shares of stock in the corporation for that year?

A. I did."

(R. 230.)

With respect to a similar change in the taxes upon the shares of the Des Moines Joint Stock Land Bank, the auditor says:

"When I made the change I intended thereby to *subject* the shares of stock in the Des Moines Stock Land Bank to a *tax* of only five mills on the dollar of the assessed valuation. The change was made intentionally for the purpose of making the taxes upon the shares of the Des Moines Joint Stock Land Bank for the year 1921 at the rate of 5 mills on the dollar of the assessed valuation and no more."

(R. 232.)

With respect to the Central Iowa Joint Stock Land Bank, the taxes upon the shares of which were originally computed at the consolidated millage rate, the auditor says:

"When I made the change in the computation of taxes upon the shares of stock of the Central Iowa Joint Stock Land Bank, I *intended* to *subject* the shares of that corporation to a tax of five mills on the dollar and no more, and I intended that the taxes on the shares of that corporation should be collected by the county treasurer on the five mill basis."
(R. 233.)

Similar evidence was given with respect to the changes made by the auditor in connection with the taxes upon other corporations. With respect to the taxation of the shares of the Jesse F. Stevenson Company for the year 1919, the auditor testified:

"Q. By whose authority was the assessment upon the shares of Jesse F. Stevenson & Company placed upon the tax list in the 'moneys and credits' column and taxed at five mills on the dollar?
A. Under authority of the County Auditor, according to law."

It is well established by the decisions of this Court that when the statutes of a State are habitually and systematically administered by the officers, charged with the duty of enforcing them in such a way as to produce a deliberate discrimination, such conduct upon the part of the State and its taxing officers constitutes a denial of the equal protection of the law in violation of the Fourteenth Amendment. The principle was thus stated by Mr. Justice Brewer speaking for the Court in *Reagan v. Farmers Loan & Trust Company*, 154 U. S. 362, in which it was said:

"Neither will the constitutionality of the statute if that be conceded, avail to oust the Federal Court of jurisdiction. A valid law may be wrongfully administered by officers of the State and so as to make such administration an illegal burden and exaction upon the individual. A tax law as it leaves the legislative hands may not be obnoxious to any challenge and yet the of-

ficers of the State charged with the administration of that valid tax law may so act under it in the matter of assessment or collection as to work an illegal trespass upon the property rights of the individual."

The rule is thus stated by Mr. Justice McReynolds in *Sunday Lake Iron Company v. Wakefield*, 247 U. S. 350:

"The purpose of the equal protection clause of the 14th Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. And it must be regarded as settled that intentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property."

In *Cummings v. Merchants National Bank of Toledo*, 101 U. S. 153, this Court had before it a case in which it appeared that the shares of corporations generally had been taxed at a fraction of their actual value while the shares of bank stock had been assessed at full value. This Court held that the action of the State constituted a violation not only of Section 5219 of the Revised Statutes but also a violation of the Fourteenth Amendment. In the course of the opinion, it is said:

"Independently of this Statute (Sec. 5219), however, we are of opinion that when a rule or system of valuation is adopted by those whose duty it is to make the assessment, which is designed to operate unequally and to violate a fundamental principle of the Constitution, and when this rule is applied not solely to one individual, but to a large class of individuals or corporations, that equity may properly interfere to restrain the operation of this unconstitutional exercise of power. That is precisely the case made by this bill, and if supported by the testimony, relief ought to be given."

A most exhaustive discussion of the controlling principles is found in the case of *Greene v. Louisville & Interurban Railway Co.*, 244 U. S. 499. There it appeared that all property in the State was uniformly assessed at from 40 to 70 per cent of its fair value, while the property and franchises of the plaintiff were assessed at 90 to 100 per cent of actual value. The assessment upon the Railway Company was made by the State Board of Equalization which was not charged with any duty as to the assessments upon other property generally in the State. This Court held that the equal protection clause of the Fourteenth Amendment applied alike to all of the taxing agencies of the State. The opinion of the Court was delivered by Mr. Justice Pitney who said:

> "Uniformity in taxing implies equality in the burden of taxation; and this equality of burden cannot exist without uniformity in the mode of the assessment, as well as in the rate of taxation." *Exchange Bank v. Hines*, 3 Ohio St. 1, 15, quoted in *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153, 158, 25 L. Ed. 903, 905.
>
> It is equally plain that it makes no difference what basis of valuation—that is, what percentage of full value—may be adopted, *provided it be applied to all alike.* The adoption of full value has no different effect in distributing the burden than would be gained by adopting 75 per cent, or 50 per cent, or even 10 per cent as the basis—so long as either was applied uniformly. The only difference would be that, supposing the requirements of the treasury remained constant, the rate of taxation would have to be increased as the percentage of valuation was reduced. (Under Sec. 171 of the Constitution, the rate of taxation may be varied by the general assembly from year to year, according to requirements.) Therefore, the principal if not the sole reason for adopting "fair cash value" as the standard for valuations is as a convenient means to an end,—the end being equal taxation. But if the standard be systematically departed from with respect to certain classes of

property, while applied as to other property, it does not serve, but frustrates the very object it was designed to accomplish. It follows that the duty to assess at full value cannot be supreme in all cases, but must yield where necessary to avoid defeating its own purpose."

The record in this case demonstrates that the county auditor in so making the tax list as to subject the shares of petitioner to grossly discriminatory taxation when compared to other moneyed capital in the hands of individuals in each of the years involved acted intentionally and with the purpose, during the whole course of time involved in this case, of bringing about the taxation of such other moneyed capital at such grossly favorable rates. This is shown by the direct admission of the county auditor and by the further fact that his acts were taken only after he had the benefit of legal counsel for the board of supervisors. That his acts were habitual and continuous is clearly disclosed by the record. There was no other moneyed capital than the shares of stock of banks and trust companies which was subjected to taxes at as great rates as the taxes imposed upon petitioner's shares. Thus, there is undoubted support for the statement of the Justices of the Supreme Court of Iowa who concurred in the dissenting opinion in this connection, as follows:

"It is shown by the record, that the capital of national banks in the city of Des Moines during the years in question was about three million dollars, while that of state banks was from four and one-half to six million dollars. The assessments upon the shares of stock found from the evidence to be competing institutions during said years, varied from about one and one-half millions in 1919 to an excess of five millions in 1922, and, under the rule laid down by the italicized portion of *First National Bank of Hartford v. City of Hartford, supra*, there has been a clear violation of section 5219 of the Revised Statutes of the United States.

> The action, hereinbefore mentioned, of the county auditor, was intentionally done. It applied to all of the assessments upon the shares of stock of the competing corporations. Therefore, within the meaning of the authorities from which quotations are hereinbefore given, to wit, *Reagan v. Farmers' Loan & Trust Company*, 154 U. S. 362, 14 S. Ct. 1047, 38 L. Ed. 1014; *Sioux City Bridge Company v. Dakota County*, 260 U. S. 441, 43 S. Ct. 190, 67 L. Ed. 340, 28 A. L. R. 979; *Cummings v. Merchants' National Bank of Toledo*, 101 U. S. 153, 25 L. Ed. 903; *Raymond v. Chicago Union Traction Company*, 207 U. S. 20, 28 S. Ct. 7, 52 L. Ed. 78, 12 Ann. Cas. 757, and the other cases cited in connection therewith, an illegal discrimination has been worked against the appellant national banks and their shareholders by systematic, intentional, wrongful; and arbitrary administration of the law. In order for the appellant national banks to be entitled to relief, it is not a prerequisite that the action of the county auditor was done with intent to injure said banks. See *Taylor v. L. & N. R. Co.*, (C. C. A.) 88 F. 350."
>
> (R. 1377.)

But it is said by the Iowa Supreme Court that the authorities to which we have referred are inapplicable to the instant case because the auditor in applying the five mill rate to the assessments upon the shares of competing corporations was acting in violation of the statutes of the state, and that his action was not binding upon the state because he did not represent it and was a mere usurper of authority. This conclusion is wholly untenable. Section 1072 Code of Iowa, Supp. of 1913, creates the office of county auditor, provides for his election and the tenure of office; Section 1383, Code Supp. 1913 requires the auditor to transcribe all assessments certified to him from the several townships, towns and cities into a book to be known as the tax list, in which shall be entered the names of the taxpayers, descriptions of land, number of acres and value, number of town lots and value, value of personal property with appropriate columns for polls and payments. By statute it is made the duty of

the county auditor to compute the taxes upon each assessment by applying the proper millage levies in the various townships, cities, towns, school districts, etc. He is required before December 31st of each year to deliver the completed tax list to the county treasurer. The list constitutes the county treasurer's authority for the collection of the taxes therein levied. Code 1897, Sec. 1387. The county auditor has authority to correct any error in the assessment or tax list and may assess and list any property omitted from taxation. Section 1385-b Code Supp. 1913. Townships, cities, towns, counties, school districts and other local taxing districts are required to certify to the county auditor the money needs of the taxing district for the ensuing year in dollars, and the auditor is required to determine the millage levy which will be required to raise the amount of money so certified by the local bodies and to apply same to the assessed valuations in making up the tax list. Chapter 343, Laws of the 37th G. A. The county treasurer is required to collect the taxes shown upon the tax list. Code 1897 Sec. 1390. The treasurer has no authority to correct errors in the tax list but must give receipt to taxpayers upon tender of the amount shown by the tax list. He is also required to furnish the taxpayer a statement in writing of the taxes due as shown by the tax list. Code 1897, Sec. 1396 and 1397.

The mere assessment of values imposes no tax. The collection of tax payments is an act which can only be consummated after the imposition of a tax. Taxes are imposed by law, but the law in Iowa remits to the county auditor the application of the levy to the values, and he is the only agent of the state, or any of its political subdivisions, invested by law with authority to impose the ultimate amount upon the taxpayer which represents his due proportion of the cost of government. It is an essential step in the fixation of tax liability in Iowa that the county auditor prepare the tax list. Perhaps he has no duty imposed upon him by law so im-

portant and so far-reaching in its effect as this duty. To say that he is not a duly constituted agent of the state and its political subdivisions in connection with the imposition of taxes such as involved in this case is to deny the express and unequivocal language employed by the legislature of the state in erecting the machinery for the exaction of the funds necessary for conducting the business of government.

Indeed, the Supreme Court of Iowa in its prior decisions has recognized the county auditor as a duly constituted agent of the state and its political subdivisions in connection with the imposition of taxes, and awarded relief where the county auditor in the performance of such duties acted illegally. In *Northwestern Bank of Ireton v. Van Roekel*, 202 Iowa 237, the court had under consideration the action of the county auditor in increasing the assessment of the Northwestern Bank, a private bank, by the sum of $50,000. It held that the auditor in increasing the assessment departed from the objective of the legislature of the state to obtain substantial uniformity in the method of assessing state, national and private banks, and affirmed the judgment of the district court setting aside such additional assessment made by the county auditor. Involved in the case was the question of the taxation of costs, and in considering that portion of the district court's judgment which taxed the costs of the proceeding to the county auditor, the court said:

> "We do not think that the costs should have been taxed against the auditor personally. *He acted officially and in good faith, and under the advice of counsel.*" (Italics ours.)

And the Supreme Court of Iowa in *Fort Madison Security Company v. Maxwell*, 202 Iowa 1346, held that the county auditor of Lee County acted illegally and beyond his power in listing upon the tax list the shares of stock of the Fort Madison Security Company as "moneyed capital" when such

shares had been assessed by the assessor as "moneys and credits", and awarded relief to the Fort Madison Security Company by reason of the illegal and unauthorized act of the county auditor.

The holding of the Iowa Supreme Court that the action of the county auditor was not binding upon the State is, we submit, wholly untenable. Having delegated authority to the county auditor to prepare the tax lists, to apply the various levies to the assessed values, and to transmit the tax lists when completed to the county treasurer, who is required to collect the taxes therein shown, can it be said that the county auditor in performing this statutory duty is not an agent of the State? There can be but one answer. The auditor is a necessary and vital part of the machinery provided by the State for the assessment and collection of taxes. The auditor acts pursuant to authority granted by the State, and his action is the action of the State.

In this case, we are dealing with the restriction imposed by Section 5219 of the Revised Statutes. The Federal law is, of course, supreme and the State is wholly without authority to impose or exact taxes which exceed that limitation. The State may not set up machinery for the imposition and collection of taxes, and by means of that machinery exact taxes upon the shares of petitioner in violation of the Federal law, and then escape the obligation of making restitution by declaring that the action of the officers was not the action of the State.

IV.

In the opinion of the Supreme Court of Iowa it is said:

> "While the lawfully imposed assessments against the competing corporations stand as having been made by the same method and at the same rate as those against the plaintiffs and the right to collect them does not ap-

> pear to be barred and it is not shown that the State or its duly constituted officers do not intend to collect such taxes, it cannot be said that plaintiffs have suffered from unequal competition because the State has collected from the national banks a larger tax in proportion than it has yet collected from the competing corporations. This record falls far short of showing that unequal or unfriendly competition has been in any wise created, fostered or encouraged by the State or those charged with the administration and enforcement of the law. * * *"
> (R. 1355-1356.)

This statement is clearly erroneous and without support in the record. It is conceded by the Supreme Court that when the tax lists were prepared and certified to the treasurer for collection the discrimination complained of by petitioner existed. The opinion of the Supreme Court of Iowa holds that it is necessary not only for petitioner to establish that discrimination then existed, but also that there is no intention on the part of the officers of the State to remove that discrimination at some time in the future. It is not true that discrimination can only result from the failure of the State and its political subdivisions to *ultimately collect* taxes from all taxpayers in the same class at the same rates. Section 5219 of the Revised Statutes and the Fourteenth Amendment to the Constitution of the United States apply to the imposition of taxes as the result of an intentional, systematic, habitual, and arbitrary method or plan of the officials in charge of the enforcement of the tax laws of the State. Discrimination, forbidden by Section 5219 of the Revised Statutes and by the Constitution of the United States, results whenever the agents of the State are authorized to collect taxes at discriminatory rates.

In the instant case, in each of the four years, when the county auditor transmitted to the county treasurer the tax lists for collection, discrimination arose. The record shows that this discrimination has continued for a period of nearly

ten years, and there is neither pleading nor proof that the officers of the State have any intention of removing such discrimination by collecting, or attempting to collect, any additional taxes upon moneyed capital in competition with petitioner. Indeed, the record affirmatively shows that many of the corporations which were taxed at such grossly favorable rates have since gone out of business, sold their assets, or become merged with other corporations, and that further collection from such corporations is impossible. The rights of petitioner, guaranteed it by the Federal Statute and by the Fourteenth Amendment to the Federal Constitution, were infringed when the tax lists were lodged with the county treasurer authorizing him to collect taxes at the discriminatory rates; and to say that such federal right can now be defeated by applying the logic of the majority opinion of the Iowa Supreme Court is merely an avoidance of federal rights upon an untenable ground.

We must confess that we are surprised that such a palpably erroneous rule should be put forward by a majority of the Iowa Supreme Court, because the majority opinion itself refers to the decision of this Court in *Montana National Bank v. Yellowstone County*, 276 U. S. 499, in which the fallacy of the majority opinion of the Iowa Court is shown. In that case it appeared that in a suit by a state bank the Supreme Court of Montana construed the statutes of the state as requiring the taxation of *shares* in national banks, and the taxation of *property* of state banks. Following this rule, the taxing officers deducted all tax-exempt securities in arriving at the value of the property of the state banks, but included such securities in fixing the value of national bank shares. And thus a clear discrimination arose against the shares of national banks, which rendered the tax upon national banks invalid under the rule in *Home Savings Bank v. Des Moines*, 205 U. S. 503. Subsequently the Supreme Court of Montana held that its former decision was wrong, and that the proper

construction of the statutes required that the shares of both state and national banks be taxed. In the meantime the discrimination had arisen because the taxing officers followed the first decision. To defeat a refund it was urged that the taxing officers of the county could go back and re-assess the shares of the state banks and thus remove any possible discrimination. This Court, in the opinion by Mr. Justice Sutherland, disposed of this contention in these words:

> "But it is said that the taxing officers of the county, in view of the later decision, now have the power to tax the shares of state banks and thus bring about an equality. As to this it is unnecessary to say more than that it nowhere appears that these officers, if they possess the power, have undertaken to exercise it or that they have any intention of ever doing so. It will be soon enough to invite consideration of this purely speculative suggestion when, if ever, the taxing officials shall have put it into practical effect."

In the instant case, as in the case cited, "it nowhere appears that the officers have undertaken to exercise the power to tax the shares of competing corporations and thus bring about equality". The 1919 taxes were payable in 1920. The 1922 taxes were payable in 1923. The decision of the Iowa Supreme Court was rendered on September 26, 1930. The instant case differs from the *Yellowstone County* case in that the contention was not even advanced on behalf of the taxing officers,—it was injected into the case by the majority opinion of the Supreme Court. There is neither pleading nor proof to support the opinion, and we submit that a mere unsupported possibility that the discrimination may be, in part, removed at some time in the future is insufficient to support a denial of federal rights under the circumstances disclosed by this record.

V.

The record discloses that during the years 1919 to 1923 litigation was pending involving the amount of the assessments upon petitioner's shares and the right of the petitioner to deduct from such assessed value liberty bonds and other government securities which were exempt from taxation under the laws of the United States. The delinquent tax collector of Polk County sent to petitioner in November 1923 a statement showing taxes of $248,954.62 and penalties of $71,976.58 then due, with the notation that 6% additional penalty would be added December 1, 1923. Included in the delinquent tax collector's notice were copies of the provisions of the Iowa law giving to the treasurer the right to proceed against the delinquent taxpayer by seizure and sale of its personal property. (See R. 1401.) On November 30, 1923, the last day upon which payment could be made so as to avoid the additional 6% penalty, petitioner under written protest paid to the county treasurer the amount shown on the delinquent tax collector's statement. (See Ex. 1766, R. 1402.)

We believe that we have demonstrated that the taxes, so far as they exceeded five mills upon the dollar, were levied in violation of Section 5219 of the Revised Statutes and the Fourteenth Amendment to the Constitution of the United States. The taxes were clearly exacted under compulsion and to avoid the imposition of additional penalties. If we are correct in our position that the State and its taxing officers were without power to exact these taxes from petitioner, clearly, under the decisions of this Court, there is an obligation upon the State to make restitution. The exaction of taxes which were unlawful because levied in violation of the Fourteenth Amendment is itself a violation of the Constitution. Thus, in *Carpenter v. Shaw*, 280 U. S. 363, it appeared that a tax had been imposed upon Indian landowners against their royalty interest in petroleum and natural gas,

and the Supreme Court of Oklahoma held that the tax applied to lands which were themselves exempt from taxation in the hands of Indian allottees under the federal law. A statute of Oklahoma denied to taxpayers the right to recover taxes unless the taxes were paid at the time when due. It appeared that the Indians had paid the taxes under protest but not until after the same became delinquent. This Court, speaking by Mr. Justice Stone, there said:

> "The Supreme Court of Oklahoma also rested its denial to petitioners of the right to recover the 1926 tax upon the ground that, having failed to pay the tax for the year when due, they were barred by the provisions of Sections 9971 and 9973 of the Compiled Oklahoma Statutes for 1921. Under these sections, relief by injunction against the collection of any tax is forbidden and a suit to recover a tax alleged to be illegally assessed is allowed only if paid 'at the time and in the manner provided by law.' But the petitioners' allegations, admitted on demurrer, are that the tax was paid under duress and compulsion to prevent the issue of respondent's warrant for its collection, to prevent the stopping by respondent of further royalty payments to them, and to prevent the accumulation of statutory penalties. These allegations are sufficient to bring the case within the ruling of this court in *Ward v. Love County*, 253 U. S. 17, 64 L. Ed. 751, 40 Sup. Ct. Rep. 419, that a denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by complusion is itself in contravention of the 14th Amendment. * * *"

The case of *Ward v. Love County*, cited in the *Carpenter* case, arose under somewhat similar circumstances. The county had collected taxes upon the lands of Indian allottees which were exempt from taxation under the laws of the United States. The Supreme Court of Oklahoma denied recovery of the taxes because the money had been distributed to the various taxing districts of the state. Mr. Justice Van Devanter, speaking for the Court, said:

* * * "To say that the county could collect these unlawful taxes by coercive means, and not incur any obligation to pay them back, is nothing short of saying that it could take or appropriate the property of these Indian allottees arbitrarily and without due process of law. Of course, this would be in contravention of the 14th Amendment, which binds the county as an agency of the state."

The record discloses that petitioner paid penalties amounting to $71,976.58 in addition to the illegal taxes. It was threatened with the imposition of an additional penalty of 6% if payment was delayed another day. The taxes were exacted in violation of a federal statute and the Federal Constitution. Petitioner sought a refund of the taxes by a mandamus action, the exclusive remedy afforded it under the laws of the State as construed by the highest court. See *Steele v. Madison County*, 198 Iowa 902. If the taxes were illegal there is clearly a federal right to have them refunded. This right was erroneously denied by the decision of the court below.

VI.

In each of the years involved there were in the City of Des Moines a large number of persons, and a few foreign corporations, who were employing moneyed capital in competition with petitioner. The assessor classified and assessed this competing capital as "moneys and credits." He made up the assessment rolls and assessor's books accordingly, and returned them to the county auditor. The county auditor extended these assessments upon the tax books as "moneys and credits" and applied to them the five mill levy upon the net valuation, which resulted in a much lesser tax than if said moneyed capital had been subjected to taxation at the same rate as that imposed upon petitioner's shares. After making the assessments of moneyed capital, the assessor submitted the same to, and they were approved by the board of

review, which was composed of the city council of the City of Des Moines.

Although admitting the existence of a clear discrimination in connection with the taxation of such moneyed capital, the Supreme Court of Iowa denied to petitioner a recovery for the reason that, under its holding, petitioner was required to appear before the board of review and object to the discriminatory assessment of such moneyed capital in the hands of such large number of persons and foreign corporations, and to appeal from the action of the board of review to the District Court of Iowa. It was held that this was the exclusive remedy afforded to petitioner by the statutes of Iowa.

Under the laws of Iowa as construed by the Supreme Court, the manner of assessment and taxation of bank shares is mandatory, and the officers charged with the duty of assessing and taxing such capital act in a purely ministerial capacity. It is the mandatory duty of the assessor to fix the value of bank shares upon the basis of the statement required to be submitted by the bank correctly showing the amount of its capital, surplus, and undivided earnings. It is the mandatory duty of the auditor to apply the consolidated millage tax to 20% of such assessed value. None of the officers are charged with any discretion in the taxation of the stock of state and national banks. Under the decisions of the Iowa Supreme Court neither the assessor nor the Board of Review possessed the power to assess petitioner's shares as "moneys and credits", and a resort to the board of review, so far as the assessment upon petitioner's shares is concerned, would have been utterly futile.

In the case of *First National Bank of Remsen v. Hayes, County Auditor*, 186 Iowa 892, the assessor had allowed certain deductions from the assets which affected the assessed value of the bank's shares. The auditor corrected the assessments. The Iowa Supreme Court, in discussing the power of the assessor and auditor, said:

"Enough has been said to indicate that the duty performed by the assessor in ascertaining the value of bank stock is merely ministerial in its nature. All exacted of him is accurate computation. In estimating the value of other property, he is required to determine its value according to his best judgment, and therein exercises a *quasi-judicial* function. See *Talley v. Brown*, 146 Iowa 360. A ministerial act has been defined as 'one which a person or board performs upon a given state of facts, in a prescribed manner, in observance of the mandate of legal authority, and without regard to or the exercise of his own judgment upon the propriety of the act being done.' * * *

"Here, the assessor is merely required to make computation from the statements furnished him, and must have, in the performance of his duty as assessor, assessed the shares of stock in the bank in accordance with computations actually made, and therein performed purely ministerial duties; and he should have assessed the bank stock in accordance with such computation. Whether he made a mistake in computation or undertook to exercise his judgment in ascertaining the value of the shares of stock is not material. In either event, the error in the assessment was such as contemplated in Section 1385-b of the Code Supplement, 1913, and the auditor acted within his authority in making the corrections."

In *Avoca State Bank v. Burke, County Auditor*, 193 Iowa 1055, it appeared that the assessor and board of review had allowed certain deductions from the assessed value of the shares on account of what was designated as "reserve for doubtful paper." This reserve was not reflected on the books of the bank, but was claimed by the bank in a letter which accompanied the tax statement. The auditor corrected the assessment upon the shares by rejecting the deduction allowed by the assessor, and fixed the assessment at the total capital, surplus, and undivided profits of the bank as required by statute. The Iowa Supreme Court said:

"* * * While it is doubtless true that the board of review could have corrected the error if it had discovered it, yet the failure of the board of review to correct the erroneous item did not validate it. If the assessor lacked the power to approve it as a deduction, it necessarily followed that the board of review lacked power also. We must hold, therefore, that the county auditor did have power to strike out the item. It follows that the order of the district court must be reversed. * * *"

See also *First National Bank of Council Bluffs v. Burke, County Auditor*, 196 N. W. 287, wherein the Iowa Supreme Court said:

"* * * It must be remembered that we are dealing with a mandate found in legislative enactment. The assessments in question are mandatory. Nothing is left to the discretion or judgment of the assessor, board of review, or taxing official. Nothing is left to any subordinate body to determine in what amount, against whom it shall be levied, or the manner or method of making the assessment and the apportionment. The statute itself fixes and determines the base of the assessment, and consequently any correction is mathematical and purely ministerial in its character. The bank itself furnishes the verified statement disclosing the data specified in the statutory requirement. The statute leaves nothing for the assessor or the board of review to do, except to correctly compute the percentage of each shareholder. It is a problem in arithmetic, and the elements or factors of the problem are furnished by the bank. The statute prescribes the method in the solution of the problem."

Under these decisions of the highest court of Iowa it is clear that neither the assessor, the board of review, nor the District Court on appeal therefrom, possessed any power to assess the shares of petitioner as "moneys and credits". The decision in the instant case declares that the remedy provided by Sec. 7235 is not available to petitioner, in so far as the assessment of competing capital owned by individuals as contra-distinguished from the stock of competing do-

mestic corporations is concerned, but that petitioner in such respect was remitted to an appearance before the local board of review. The decision of the Iowa Court in this case does not point out what relief the board of review could have accorded petitioner under the former decisions which we have cited. It merely declares that as to the moneyed capital assessed as "moneys and credits" petitioner's remedy of appearance before and appeal from the board of review was exclusive. We have seen that under the previous pronouncements of the Iowa Court, complaint to the board of review with a demand that petitioner's shares be assessed as "moneys and credits" would have been absolutely futile. If the Supreme Court of Iowa, by its decision means to say that petitioner had a remedy by appearance before the board and complaint as to the assessment of its own shares as "corporation stock" it is apparent that the petitioner was required to do a futile thing. Indeed the situation in which petitioner would be placed would be identical with that of the plaintiff in *Montana National Bank v. Yellowstone County*, 276 U. S. 499 from which we have already quoted in the argument.

There, it will be remembered, discrimination against the shares of a national bank arose because the law as originally construed by the highest court of the state, required the taxation of *shares* of national banks and the taxation of *property* of state banks, thus allowing state banks to escape taxation upon their tax exempt securities, which privilege was denied to national banks. When a national bank sought a refund of the taxes upon its shares because of this discrimination the Montana Supreme Court reversed itself, declaring the previous decision erroneous. It was also urged that petitioner in that case should have availed itself of an administrative remedy by appearance before the assessing board. This argument was promptly overruled by this

court. We quote from the opinion of Mr. Justice Sutherland:

> "Finally, it is urged that plaintiff in error may not maintain this action because of its failure to apply to the county board of equalization for an administrative remedy. We do not stop to inquire whether under any circumstances such remedy was open to the taxpayer, for the short answer is that the decision of the Supreme Court of Montana in the *Rogers* case would have rendered any such application utterly futile since the county board of equalization was powerless to grant any appropriate relief in the face of that conclusive decision. See *Hills v. National Albany Exch. Bank*, 105 U. S. 319, 321, 26 L. ed. 1052, 1053; *Whitbeck v. Mercantile Nat. Bank*, 127 U. S. 193, 199, 32 L. ed. 118, 120, 8 Sup. Ct. Rep. 1121."

The application to the instant case is clear and needs no further extended discussion. None of the decisions of the Iowa Supreme Court cited in the opinion had been handed down when the assessments were being made, nor when petitioner paid its taxes in November 1923. Nor has the Iowa court ever overruled its pronouncements to the effect that the statues of the state make it the mandatory duty of the assessor and board of review to assess the shares of petitioner as "corporation stock" or personal property. We say therefore that this case is "on all fours" with the Montana case, and that the decision of the Court below that petitioner had an available remedy by appeal from the board of review will not support a denial of a refund of taxes which were concededly levied in violation of Section 5219 of the Revised Statutes.

While it has never yet been suggested during the history of this litigation it may be urged that petitioner had an adequate remedy by appearance before the board of review and complaint to that body as to the improper assessments upon the moneyed capital assessed as "moneys and credits".

The opinion of the Iowa court does not indicate that it was intended to adopt such a construction, but as the same may be urged by counsel for respondents we shall next give some attention thereto. Section 1373 Code Supplement 1913, now Section 7135 Code of 1927, which was in force at the times the matters in controversy arose, is as follows:

"Complaint to board of review—appeal. Any person aggrieved by the action of the assessor in assessing his property may make oral or written complaint thereof to the board of review, which shall consist simply of a statement of the errors complained of, with such facts as may lead to their correction, and any person whose assessment has been raised or whose property has been added to the assessment rolls, as provided in the preceding section, shall make such complaint before the meeting of the board for final action with reference thereto, as provided in said section, and appeals may be taken from the action of the board with reference to such complaints to the district court of the county in which such board holds its sessions, within twenty days after its adjournment. Appeals shall be taken by a written notice to that effect to the chairman or presiding officer of the reviewing board, and served as an original notice. The court shall hear the appeal in equity and determine anew all questions arising before the board which relate to the liability of the property to assessment or the amount thereof, and its decision shall be certified by the clerk of the court to the county auditor, who shall correct the assessment books in his office accordingly. Any officer of a county, city, town, township or school district interested or a taxpayer thereof may in like manner make complaint before said board of review in respect to the assessment of any property in the township, city or town and an appeal from the action of the board of review in fixing the amount of assessment on any property concerning which such complaint is made, may be taken by any of such aforementioned officers. Such appeal is in addition to the appeal allowed to the person whose property is assessed and shall be taken in the name of the county, city, town, township or school district interested and tried in the same manner, except that the notice of

appeal shall also be served upon the owner of the property concerning which the complaint is made and affected thereby or person required to return said property for assessment. Upon trial of any appeal from the action of the board of review fixing the amount of assessment upon any property concerning which complaint is made, the court may increase, decrease or affirm the amount of the assessment appealed from. (32 G. A. ch. 60, Sec. 1; 18 G. A. ch. 109 Sec. 1; C. '73, Sec. 831; R. Sec. 740.)"

This section it will be readily seen by its terms merely gives to "any officer of a county, city or town or a taxpayer the right to make complaint before said board of review in respect to the assessment of any property in the township, city or town, and an appeal from the board of review in fixing *the amount of assessment on any property concerning which such complaint is made, may be taken by any of such aforementioned officers.*" A taxpayer may make complaint but he has no right of appeal except as to his own property. The only person who can take an appeal in such case is the "*officer*" of the city or town. Is the existence of such a remedy as disclosed by the statute which we have quoted a sufficient basis for denying to petitioner a refund of taxes and penalties exacted of it by compulsion in violation of the laws and Constitution of the United States? We desire to call the attention of the Court to the situation in which petitioner was placed when the board of review was in session.

The record shows that there were several thousand assessments upon individuals, foreign corporations and copartnerships which had been made by the assessor as "moneys and credits". These assessments included real estate contracts, purchase money mortgages, open accounts, money on deposit in banks, currency, judgments, liens, bills of exchange, and choses in action, as well as notes, bonds and mortgages evidencing loans of the taxpayer's funds in competition with the business of petitioner. They were all

mingled upon the assessment rolls so that it was impossible to determine which items should have been assessed as "moneyed capital" and which were properly assessed as "moneys and credits". An extended investigation as to the property returned on each assessment roll was necessary before it could be said that an improper assessment had been made as "'moneys and credits". The time fixed by the statutes of Iowa for the taxpayer to make complaint before the board was but a few days, (in fact the Board of Review could not exist for more than thirty days under the statutes of the State). The Supreme Court of Iowa had held that a taxpayer coming before the board for relief must state his grievance with

> "sufficient particularity, and must specify his complaint with such certainty as to enable the tribunal, supposing it to possess ordinary intelligence to comprehend and understand the matters of which complaint is made, and to grant the particular relief sought for in the complaint. He is not entitled to have any question determined on appeal except such as he called the tribunal to determine in the first place."
>
> *First National Bank v. City of Council Bluffs*, 182 Iowa, 107.

The board of review, composed of the members of the City Council of the city, was not a judicial body. It had no power to issue subpoenas, require the attendance of witnesses, nor require the production of books or papers of the taxpayers assessed on the moneys and credits basis. The competitors of petitioner who were escaping more than 80 per cent of the taxes which they should pay would not of course volunteer testimony in aid of petitioner. It was neither practical nor possible for petitioner to have searched out, learned and stated to the city council, within the time required by statute, the errors of which they complained with the necessary facts which would lead to their correction—

much less to have had the city council determine the question.

In *Munn v. Des Moines National Bank, supra,* which involved the taxation of bank shares in the same taxing district for the same years as in this case, it was urged before the Circuit Court of Appeals that the plaintiff in that action had an adequate remedy, under the laws of Iowa by appearance before and appeal from the board of review, and so was not entitled to equitable relief in the Federal Courts. The contention was declared without foundation in the opinion by Circuit Judge Sanborn who examined the record with great care. We quote the following from the opinion in the *Munn* case:

> "They rely on the proposition that a taxpayer must exhaust his remedies under the administrative boards before he may have relief by a judicial tribunal and cite many authorities, including *First National Bank v. Weld County,* 264 U. S. 450, 44 S. Ct. 385, 68 L. Ed. 784, and *Griswold Land & Credit Co. v. County of Calhoun,* 198 Iowa, 1240, 201 N. W. 11, two opinions perhaps as favorable to their view as any to which they call attention.
>
> * * *
>
> In each of these cases the property of the complainants had been illegally assessed and taxed too high, and that fact was shown by the public records of which the complainants had legal notice at such times that they could have availed themselves of the remedy offered by the statutes of the state through the administrative boards. It was not so with the shareholders of these banks and the banks themselves. Their grievances were that the property of other taxpayers, taxpayers in whose hands was property that they had used and were using during the years in question in competition with the normal business of these banks, was by the taxing officers illegally taxed too low. That fact, however, did not appear upon the face of any of the public records, because those records did not separate the taxpayers who had used and were using their moneyed capital in competition with the normal business of these banks from those who had not done and were not doing so, and

time, search, and extended investigation after the amounts of the taxes in each year were fixed and disclosed by the public records were indispensable to the discovery and statement of their names and their competing property.

Section 1373 of the Code Supplement of Iowa of 1913 required any person aggrieved by the taxation of his or its property to make an oral or written complaint, which should consist "of a statement of the errors complained of, with such facts as may lead to their correction, * * * before the meeting of the board for final action with reference thereto." The assessment books in each of these years were not completed so that a taxpayer could know what the amounts of his assessments and taxes were until within a few days before the final action of the board of review with reference thereto. The time fixed by the statute for a taxpayer to make his statement to the board of review of the errors he complained of with such facts as might lead to their correction was only a few days. It was a very short time. The Supreme Court of that state had held that the taxpayer coming before the board of review for relief must state his grievance "with sufficient particularity and must specify his complaint with sufficient certainty to enable the tribunal, supposing it to possess ordinary intelligence, to comprehend and understand the matters of which complaint is made, and to grant the particular relief sought for in the complaint. He is not entitled to have any question determined on appeal, except such as he called upon the tribunal to determine in the first place." *First National Bank v. City of Council Bluffs*, 182 Iowa, 107, 112, 113, 161 N. W. 706, 708.

The record in these cases before us shows that the number of instances in which the complainants in this court claim that moneyed capital in the hands of individuals taxable in the county was used in competition with the normal business of these banks and had been illegally taxed at the five mills' rate in the years under consideration was in the hundreds; that the value of the property that they claimed had been thus illegally taxed was more than $6,000,000; that the number of items of such moneyed capital so taxed was many hundreds. The number of witnesses presented to the court below in the hearing of these cases was more than 150. The testi-

mony was condensed and appears in narrative form, and the printed pages of the record are 599. The tribunal to which these banks must present all their alleged errors and complaints, "with such facts as may lead to their correction" (section 1373), was the city council of the city of Des Moines. The Supreme Court of Iowa had declared that, on an appeal from the board of review to the court from the action of this city council, the complainants would not be "entitled to have any question determined on appeal, except such as he called upon the tribunal (board of review) to determine in the first place." 182 Iowa, 112, 113, 161 N. W. 708.

The city council of Des Moines was not a judicial body. The competitors of these banks and their shareholders that had escaped four-fifths to five-sixths of the taxes they should have paid and their employees were not very likely to volunteer testimony or evidence to sustain the claims of these banks, and the city council had no power to issue subpoenas to compel them to testify. It does not seem to us to have been either practical or possible for the shareholders of these banks, or the banks themselves, to have searched out, learned, and stated to this city council within the times required by section 1373 the errors of which they complained "with such facts as may lead to their correction" (section 1373), much less to have had the city council so determine the questions they present that the complainants could have obtained through the proceeding authorized by section 1373 any just or adequate remedy for the grievances they have presented. In our opinion the facts of these cases, some of which have now been recited, clearly except them from the operation of the proposition that they must exhaust their remedy before the administrative board, because that remedy was not only inadequate but necessarily impractical and futile, and the court below had plenary jurisdiction in equity to hear and decide the questions in these cases and to grant adequate relief to the complainants."

The trial of this case in the District Court consumed more than sixteen weeks and more than one hundred and fifty witnesses were called upon behalf of petitioner. To say that petitioner's exclusive remedy under the laws of

Iowa to produce all the facts with reference to the ownership and use of moneyed capital by the hundreds of individual taxpayers who were assessed upon "moneys and credits" is to impose upon petitioner an impossible obligation; an obligation which, in the very nature of the case could not be met within the time required. The remedy which the Iowa Supreme Court declares was the exclusive remedy available to petitioner as to the "moneyed capital" improperly assessed as "moneys and credits" was therefore impractical and futile, and amounted to no remedy at all.

This court has consistently held that when the laws of a State, as construed by the highest court require a taxpayer to resort to a remedy which is utterly futile or unavailing it will be held the equivalent of no remedy at all. Such a law violates both the due process and equal protection clauses of the Fourteenth Amendment.

We have already seen that petitioner had no right to appeal from the determination of the Board of review with respect to the assessments of others on the moneys and credits basis. This action could only be taken by some public officer. But even if such remedy may be said to be available to a taxpayer in the position in which petitioner found itself, to impose such a requirement violates the equal protection and due process clauses of the Fourteenth Amendment. Thus in *Sioux City Bridge Co. v. Dakota County*, 260 U. S. 441, it appeared that the property of the Bridge Company was assessed at 90 to 100 per cent of actual value while other property generally was systematically taxed at but 50 per cent of actual value. The Supreme Court of Nebraska held that the taxpayer's exclusive remedy was to prosecute appeals from the action of the administrative tribunal, in each case where property had been systematically undervalued. This Court speaking by the late Chief Justice Taft said:

"The supreme court does not make it clear whether it thinks the discrimination charged was proved or not, but, assuming the discrimination, it holds that the Bridge Company has no remedy except "to have the property assessed, below its true value raised, rather than to have property assessed at its true value reduced." The dilemma presented by a case where one or a few of a class of taxpayers are assessed at 100 per cent of the value of their property, in accord with a constitutional or statutory requirement, and the rest of the class are intentionally assessed at a much lower percentage, in violation of the law, has been often dealt with by courts, and there has been a conflict of view as to what should be done. There is no doubt, however, of the view taken of such cases by the Federal courts in the enforcement of the uniformity clauses of state statutes and constitutions, and of the equal protection cause of the 14th Amendment. The exact question was considered at length by the circuit court of appeals of the sixth circuit in the case of *Taylor v. Louisville & N. R. Co.*, 31 C. C. A. 537, 60 U. S. App. 166, 88 Fed. 350, 364, 365, and the language of that court was approved and incorporated in the decision of this court in *Greene v. Louisville & Interurban R. Co.*, 244 U. S. 499, 516-518, 61 L. ed. 1280, 1289, 1290, 37 Sup. Ct. Rep. 673, Ann. Cas. 1917E, 88. The conclusion in these and other Federal authorities is that such a result as that reached by the supreme court of Nebraska is to deny the injured taxpayer any remedy at all because it is utterly impossible for him, by any judicial proceeding, to secure an increase in the assessment of the great mass of underassessed property in the taxing district. This court holds that the right of the taxpayer whose propery alone is taxed at 100 per cent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed, even though this is a departure from the requirement of statute. The conclusion is based on the principle that where it is impossible to secure both the standards of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law. In substance and effect, the decision of the Nebraska supreme court in this case upholds the violation of the 14th Amendment to the in-

jury of the Bridge Company. We must, therefore reverse its judgment."

Taylor v. L. & N. Railroad Co., 88 Fed. 350, involved a case of systematic undervaluation of real and personal property by the taxing authorities and the taxation of the property of a Railroad Company at substantially full value. It is there said:

> "It is said on behalf of the defendants that the only method consistent with the constitution is by raising the assessments of the real and personal property. This is no remedy at all. It has been suggested (but we cannot regard the suggestion as a serious one) that the railroad companies of the state should go before the taxing authorities of each county, and, after notifying each taxpayer, attempt to secure an increase in the total tax assessment of the real and personal property of the state from $312,000,000 to $416,000,000. The absolute futility of such a course, the enormous expense, and the length of time necessary in attempting to follow it, need no comment."

During the years 1920 to 1922 inclusive, the moneyed capital which was improperly *assessed* and taxed as "moneys and credits" comprised only about twenty-five per cent of the total amount of moneyed capital shown by the evidence. The balance consisted, as we have seen, of shares in competing corporations which were assessed upon the same basis as the shares of petitioner, but as to which the discrimination arose because of the deliberate and systematic acts of the county auditor, in applying the five mill rate thereto. In the year 1919 the moneyed capital assessed as "moneys and credits" was only about forty per cent of the total. In all four of the years there was a substantial and material amount of such capital assessed upon a basis of equality with the shares of petitioner, but taxed at discriminatory rates. The points considered in this division of

the argument are therefore not decisive of the case, even though petitioner's contention be overruled.

We submit, however, that the decision of the Iowa Supreme Court as to this branch of the case is unsound, and that the laws of Iowa, as construed by the highest court of the State in the opinion below, deny to petitioner any remedy at all as to the moneyed capital assessed as "moneys and credits". In this respect the Iowa law is necessarily invalid because in conflict with the laws and Constitution of the United States. We again respectfully call the attention of this court to the rules laid down in *Ward v. Love County* and *Carpenter v. Shaw, supra,* wherein this court holds that taxes exacted in violation of the law and Constitution of the United States by compulsion may be recovered back, and that to deny such right is in itself a violation of the Fourteenth Amendment. The decision of the Court below denies petitioner a Federal right on the ground of the existence of an administrative remedy, which as we have shown was not open to petitioner, and therefore constitutes a denial of the Federal rights asserted. The opinion of the Iowa Court on this branch of the case is in conflict with the decisions of this Court and should be reversed.

VII.

The Des Moines National Bank, Bankers Trust Company, and the Iowa Loan and Trust Company were in each of the years from 1919 to 1922, inclusive, engaged in the general banking business in the city of Des Moines, Polk County, Iowa. Early in 1923 each of these banks instituted in the United States District Court for the Southern District of Iowa suits against the County Treasurer of Polk County, Iowa, seeking writs of injunction against the collection of more than five mills on the dollar of valuation, placed upon their respective shares of stock, as taxes for each of said

years. The allegations upon which such relief was sought were substantially identical with the allegations involved in this case as is apparent from the bill of complaint in that case which was introduced in evidence here, and appears in the record at Page 825. The defendant there was represented by the Attorney-General of the state, by the Corporation Counsel of the City of Des Moines, by the special counsel of the board of supervisors of Polk County, and the expense of the litigation was borne by the board of supervisors of Polk County. Issues were joined and testimony taken before a Master, who made a report of his findings, specifically finding among other things that there was in Polk County, Iowa in each of said years 1919 to 1922, inclusive, a relatively large and substantial amount of moneyed capital within the meaning of Section 5219 of the Revised Statutes of the United States, which was subjected to taxation at only five mills on the dollar of assessed valuation; that such moneyed capital was so subjected to taxation at such rate as the result of a systematic, intentional and habitual plan or course of conduct on the part of the taxing officials of Polk County, Iowa, while at the same time the shares of stock of the plaintiffs in said suits were subjected to taxation at the consolidated levy rate applied to twenty per cent (20%) of the assessed value of their shares of stock. Exceptions were taken to the Master's report, and upon being heard, were overruled and decree and judgment in favor of the plaintiffs therein was entered. Whereupon an appeal was perfected for Allen Munn, as County Treasurer of Polk County, Iowa to the Circuit Court of Appeals of the Eighth Circuit, the board of supervisors of Polk County defraying the expenses of such appeal. Such appeal was submitted to and decided by the Circuit Court of Appeals, the decision resulting in the affirmance of the judgment and decree of the District Court. The opinion of the Circuit Court of Appeals and its mandate were introduced in evidence in this

case. (Record 975.) The opinion appears in 18 Federal, 2d Series, 269. The decision of the Circuit Court of Appeals became final, and the Des Moines National Bank and the Bankers Trust Company paid taxes at the rate of five mills on the dollar of assessed valuation for each of the years 1919 to 1922, inclusive. Prior to paying taxes for such years, the Iowa Loan and Trust Company was placed in the hands of a receiver and has never paid any taxes for those years.

We have then a situation where, by virtue of the construction placed upon the acts of the taxing officials of the State of Iowa and its political subdivisions, in the identical taxing district, for the very same years involved in these cases, the shares of stock of three institutions engaged in commercial banking in the City of Des Moines in direct competition with the petitioner in each of said years were subjected to taxation at only five mills on the dollar of assessed valuation, while the shares of stock of the petitioner were subjected to taxation at from five to more than six times that rate in said years. There can be no question of the finality and conclusiveness of the judgment in the case of *Munn v. Des Moines National Bank, et al., supra,* as between the parties thereto. By virtue of the lapse of time no further review could possibly be had in those cases. Indeed, pursuant to such judgment the taxing officials of the state and its political subdivisions have accepted, received and receipted for taxes from those institutions for the years involved in this case on the basis of five mills on the dollar. Now, when it is known that the same parties who are defendants in these actions not only were aware of the pendency of that litigation, but actually assumed, conducted and bore the expense of the defense of that suit, surely there can be no escape from the conclusion that they are bound by the findings and the decision in those cases, and that such are conclusive in this case. That those cases involved a Federal question is be-

yond any sort of dispute, and involving Federal questions, the decisions of the United States Courts when final are binding, and must be followed by the courts of Iowa. Indeed, the Iowa Supreme Court in *Des Moines National Bank v. Fairweather*, 191 Iowa, at Page 1244, speaking by Mr. Justice Evans, recognized this rule and there said:

> "Such also is the holding of the Federal courts, whose precedents are obligatory upon us upon this question. See *Hannan v. First National Bank*, 269 Fed. 527. The cited case was decided very recently by the Federal Circuit Court of Appeals for this Circuit. It reveiws the previous cases with great care, and holds squarely that there is no conflict between Section 5219 of the Revised Statutes of the United States and Section 1322 of the Code of Iowa.
>
> In view of this pronouncement, it is quite needless that we enter into argument on this feature of the case. Following the Federal holding in the *Hannan* case, we must hold that the first six grounds of complaint set forth in plaintiff's petition must each and all be overruled."

Further, the Iowa Court, in speaking to the question of privity of defendants and the binding effect of a previous judgment upon a defendant in a subsequent case, has said:

> "One who, though not a party, defends or prosecutes an action by employing counsel, paying costs, and doing those things which are generally done by a party, is bound by the judgment rendered therein. *Stoddard v. Thompson*, 31 Iowa, 80; *Marsh v. Smith*, 73 Iowa, 295."

And again, where as here, the judgment claimed to be conclusive was rendered against a political subdivision of a State or its legal representatives, it was held:

> "A judgment against a County or its legal representatives in a matter of general interest to all the people thereof, as one respecting the levy and collection of taxes, is binding not only as against the official repre-

sentatives of the County named in the proceeding as defendants, but upon all the citizens thereof, though not made parties defendant by name."

Cannon v. Nelson, 83 Iowa 242."

So, we assert that because of the binding effect of the judgment in the case of *Munn v. Des Moines National Bank, et al.* upon the respondents in this case, petitioner was entitled to judgment as prayed.

But we desire the Court to consider the effect of the judgment in the case of *Munn v. Des Moines National Bank, et al., supra*, from another aspect.

That case, as we have shown, involved the taxation of the shares of stock of the Des Moines National Bank, the Bankers Trust Company, and the Iowa Loan and Trust Company, during the years 1919 to 1922 inclusive, which are the same years as are involved in this case. Each of those institutions was engaged in the commercial banking business in Des Moines, Iowa, the location of the business of petitioner. There were involved in those cases Federal questions, namely: the violation through the method of taxation employed by the taxing officials of the State of Iowa and its political subdivisions of the provisions of Section 5219 of the Revised Statutes of the United States, and of the constitutional rights of the plaintiffs in those cases. These Federal questions were resolved in favor of the plaintiff banks in those cases, and the decision of those cases is a finality. So final was the decision that the taxes which were ultimately exacted from the plaintiffs therein was at the rate of only five mills on the dollar of assessed valuation in each of the years involved. There can be no question of the right of the Federal courts to have decided the Federal questions presented by those cases, nor of the fact that the Federal courts of final resort did decide those questions, and the decision was in favor of the plaintiff banks, who were direct active banking competitors of the petitioner. The de-

cision and judgment in those cases became binding upon the parties thereto and upon everyone else, for that judgment, being a finality, could not be further reviewed. So here we have the taxation in the years 1919 to 1922, inclusive, of the shares of stock of a national and two state banks which were in direct banking competition with the appellants at the rate of five mills on the dollar of assessed valuation. True, this taxation was influenced by and the result of the final decision of the United States Courts, but it was none the less real, and this does not alter the fact that shares of stock of competing banks in Des Moines were taxed at five mills on the dollar in the years involved in this suit, nor was such result any more brought about by the decision of a Federal question than was the result of the application of the decision of *Home Savings Bank v. Des Moines*, 205 U. S. 503, to the case of *First National Bank of Estherville v. City Council*, 150 Iowa 95, where it was held that the holding in the former case was final and conclusive in the latter because it was the final decision of a Federal right by the United States Courts. Such being the state of the law as announced by these decisions, and such being the facts as to which there can be no dispute, we insist that petitioner was entitled to the relief sought.

CONCLUSION.

As we have seen it was established beyond controversy, and the opinion of the court below concedes that during the four years in question there existed in Des Moines, Iowa, large and relatively material amounts of moneyed capital in the form of shares of corporations engaged in the loan and investment business and in the form of moneyed capital in the hands of foreign corporations, co-partnerships and individuals. That this moneyed capital was deliberately, systematically, habitually and intentionally taxed at but five

mills on the dollar is clearly established. That such taxation was pursuant to a system, plan or method deliberately adopted by the taxing officers of the State is likewise clear and undisputed.

The Supreme Court of Iowa denied to petitioner the relief sought on the ground that the county auditor of Polk County, while a duly elected public official, acting in pursuance of the duties enjoined upon him by the statutes of the State, was a mere usurper of authority. We think we have demonstrated that this claim is untenable. Relief was likewise denied to petitioner, because, while it was shown that a gross discrimination prohibited by the laws and Constitution of the United States occurred during all of the four years, petitioner did not show that the taxing officers had no intention of removing such discrimination at some time in the future. This pronouncement of the Supreme Court seems little short of absurd in view of the fact that nearly ten years had elapsed since the taxes became payable, and there was neither pleading nor proof that the taxing officers intend to even attempt the collection of further taxes upon the great mass of competing moneyed capital, which has escaped more than 80 per cent of the taxes which it should have borne during the years involved.

The taxes upon the shares of petitioner were exacted by compulsion in violation of Section 5219 of the Revised Statutes and in violation of the Fourteenth Amendment to the Constitution of the United States. The majority opinion of the court below in denying to petitioner a refund of the grossly discriminatory taxes thus illegally exacted of it is, as we have seen based upon wholly untenable grounds. We submit that petitioner has shown that it is entitled to a refund of all taxes upon its shares of stock during the years 1919 to 1922 inclusive; in excess of five mills upon the dollar, and that the majority opinion of the Iowa Supreme Court denying such refund is in conflict with the decisions

of this Court and denies petitioner rights guaranteed under the Statutes and Constitution of the United States. It follows that the case should be reversed, with directions to the Supreme Court of Iowa to enter such order or decree as may secure to petitioner the Federal rights to which it is entitled.

Respectfully submitted,

J. G. GAMBLE,

A. B. HOWLAND,

Counsel for Petitioner.

APPENDIX.

The following are the statutes of Iowa so far as material to this appeal, involving the procedure as to the assessment and collection of taxes.

SECTION 1310, 1913 SUPPLEMENT.

—MONEYS—CREDITS—ANNUITIES—BANK NOTES—STOCK.—Moneys, credits and corporation shares or stocks, except as otherwise provided, cash, circulating notes of national banking associations, and United States legal tender notes, and other notes, and certificates of the United States payable on demand, and circulating or intended to circulate as currency, notes, including those secured by mortgage, accounts, contracts for cash or labor, bills of exchange, judgments, choses in action, liens of any kind, securities, debentures, bonds other than those of the United States, annuities, and corporation shares or stocks not otherwise taxed in kind, shall be assessed, and, excepting shares of stock of national, state and savings banks and loan and trust companies, and moneyed capital as hereinafter defined, shall be taxed upon the uniform basis throughout the state of five mills on the dollar of actual valuation, same to be assessed and collected where the owner resides. The millage tax here provided for shall be in lieu of all other taxes upon moneys and credits and shall be levied by the board of supervisors, placed upon the tax list and collected by the county treasurer, and the amount collected in the various taxing districts of the state shall be divided between the various funds upon the same *pro rata* basis as other taxes collected in such taxing district are apportioned. All moneyed capital within the meaning of section fifty-two hundred nineteen of the revised statutes of the United States shall be listed and assessed against the owner

thereof at his place of business, and if a corporation at its principal place of business, at the same rate as state, savings, national bank and loan and trust company stock is taxed, in the same taxing district, and at the actual value of the moneyed capital so invested. The person or corporation using moneyed capital in competition with bank capital shall furnish the assessor upon demand a full and complete itemized sworn statement showing the amount of moneyed capital so used.

SECTION 1322, 1913 SUPPLEMENT.

NATIONAL, STATE AND SAVINGS BANKS—REFUSAL TO COMPLY WITH STATUTE—PENALTY.—Section thirteen hundred twenty-two of the supplement to the code, 1907, is hereby repealed and the following enacted in lieu thereof:

"Shares of stock of national banks and state and savings banks, and loan and trust companies, located in this state, shall be assessed to the individual stockholders at the place where the bank or loan and trust company is located. At the time the assessment is made the officers of national banks and state and savings banks and loan and trust companies shall furnish the assessor with lists of all the stockholders and the number of shares owned by each, and the assessor shall list to each stockholder under the head of corporation stock the total value of such shares. To aid the assessor in fixing the value of such shares, the said corporation shall furnish him a verified statement of all the matter provided in section thirteen hundred twenty-one of the supplement to the code, 1907, which shall also show separately the amount of the capital stock and the surplus and undivided earnings, and the assessor from such statement shall fix the value of such stock based upon the capital, surplus, and undivided earnings. In arriving at the total value of the shares of stock of such corporations, the amount of their capital actually in-

vested in real estate owned by them and in the shares of stock of corporations owning only the real estate (inclusive of leasehold interests, if any,) on or in which the bank or trust company is located, shall be deducted from the real value of such shares, and such real estate shall be assessed as other real estate, and the property of such corporation shall not be otherwise assessed. A refusal to furnish the assessor with the list of stockholders and the information required under this section shall be deemed a misdemeanor and any bank or officer thereof so refusing shall be punished by a fine not exceeding five hundred dollars."

SECTION 1322-1a, 1913 SUPPLEMENT.

BANK STOCKS—MONEYED CAPITAL—TAXABLE VALUE.—For the purpose of placing the taxation of bank and loan and trust company stock and moneyed capital as nearly as possible upon a taxable value relatively equal to the taxable value at which other property is now actually assessed throughout the state as compared with the actual value thereof, it is hereby provided that state, savings and national bank stock and loan and trust company stock and moneyed capital shall be assessed and taxed upon the taxable value of twenty per cent of the actual value thereof, determined as herein provided, which twenty per cent of the actual value shall be taken and considered as the taxable value and shall be taxed as other property in such taxing district.

CODE SUPPLEMENT OF 1913—SECTION 1373:

"Complaint to board of review—appeal. Any person aggrieved by the action of the assessor in assessing his property may make oral or written complaint thereof to the board of review, which shall consist simply of a statement of the errors complained of, with such facts as may lead to their correction, and any person whose assessment has been raised or whose property has

been added to the assessment rolls, as provided in the preceding section, shall make such complaint before the meeting of the board for final action with reference thereto, as provided in said section, and appeals may be taken from the action of the board with reference to such complaints to the district court of the county in which such board holds its sessions, within twenty days after its adjournment. Appeals shall be taken by a written notice to that effect to the chairman or presiding officer of the reviewing board, and served as an original notice. The court shall hear the appeal in equity and determine anew all questions arising before the board which relate to the liability of the property to assessment or the amount thereof, and its decision shall be certified by the clerk of the court to the county auditor, who shall correct the assessment books in his office accordingly. Any officer of a county, city, town, township or school district interested or a taxpayer thereof may in like manner make complaint before said board of review in respect to the assessment of any property in the township, city or town and an appeal from the action of the board of review in fixing the amount of assessment on any property concerning which such complaint is made, may be taken by any of such aforementioned officers. Such appeal is in addition to the appeal allowed to the person whose property is assessed and shall be taken in the name of the county, city, town, township or school district interested and tried in the same manner, except that the notice of appeal shall also be served upon the owner of the property concerning which the complaint is made and affected thereby or person required to return said property for assessment. Upon trial of any appeal from the action of the board of review fixing the amount of assessment upon any property concerning which complaint is made, the court may increase, decrease or affirm the amount of the assessment appealed from. (32 G. A. ch. 60, Sec. 1; 18 G. A. ch. 109, Sec. 1; C. '73, Sec. 831; R. Sec. 740.)"

SECTION 1383, 1913 SUPPLEMENT.

TAX LIST.—All taxes, except road taxes, which are uniform throughout any township or school district shall be formed into a single tax, and entered upon the tax list in a single column, to be known as a consolidated tax, and each receipt shall show the percentage levied for each separate fund. Before the first day of January in each year, the county auditor shall transcribe the assessments of the several townships, towns or cities into a book, to be provided at the expense of the county for that purpose, to be known as the tax list, properly ruled and headed, with distinct columns, in which shall be entered the names of taxpayers, descriptions of lands, number of acres and value, number of town lots and value, value of personal property and each description of tax, with a column for polls and one for payments, and shall complete the same by carrying out the totals and footings of columns. At the end of the list of each township, town or city he shall make an abstract thereof, and apportion the consolidated tax among the respective funds to which it belongs, according to the number of mills levied for each.

SECTION 1385-B, 1913 SUPPLEMENT.

ERRORS CORRECTED—OMITTED PROPERTY.—The auditor may correct any error in the assessment or tax list, and may assess and list for taxation any omitted property; but before assessing and listing for taxation any omitted property he shall notify by registered letter the person, firm, corporation, or administrator, or other person in whose name the property is taxed, to appear before him at his office within ten days from the time of said notice and show cause, if any there be, why such correction or assessment should not be made, and should such party feel aggrieved at the ac-

tion of said auditor he shall have the right of appeal therefrom to the district court. And if such correction or assessment is made after the books have passed into the hands of the treasurer he shall be charged or credited therefor as the case may be. All expense incurred in the making of said correction or assessment shall be borne *pro rata* by the funds which are affected by said correction and the proceedings to be reported to the board of supervisors.

CODE OF IOWA, 1897, SEC. 1387.

TAX LIST DELIVERED.—He (County Auditor) shall make an entry upon the tax list showing what it is, for what county and year, and deliver it to the county treasurer on or before the thirty-first day of December, taking his receipt therefor; and such list shall be a sufficient authority for the treasurer to collect the taxes therein levied. But no informality therein, and no delay in delivering the same after the time above specified, shall affect the validity of any taxes, sales, or other proceedings for the collection of such taxes.

CODE OF IOWA, 1897, SEC. 1390.

TREASURER TO COLLECT.—The treasurer, after making the entry, shall proceed to collect the taxes, and the list shall be his authority and justification against any illegality in the proceedings prior to receiving the list; and he is also authorized and required to collect, as far as practicable, the taxes remaining unpaid on the tax books of previous years.

CODE OF IOWA, 1897, SEC. 1396.

INFORMATION AS TO TAXES DUE.—The treasurer, when applied to by letter and receiving thirty cents in postage stamps or money, and ten cents additional for each tract of one

hundred and sixty acres in excess of three hundred and twenty acres, in no case to exceed fifty cents, shall correctly answer the same by mail, giving the amount and interest of unpaid taxes and of any tax sales thereof as the same appear upon the tax list in his office, and upon the return of the letter or a copy, before the last day of the current month, with the demand due as shown therein, he shall pay the taxes and forward to the sender a tax receipt without further charge.

CODE OF IOWA, 1897, SEC. 1397.

PENALTY.—Any treasurer who shall neglect for twenty days after the receipt of any such letter, with money or stamps inclosed as aforesaid, to answer the same fully as required in the preceding section, or who shall directly or indirectly receive or be concerned in receiving any greater compensation for the service mentioned than as above provided, shall forfeit to the person aggrieved, for each offense, the sum of fifty dollars, which may be recovered in a civil action.

CODE OF IOWA, 1897.
(Code of 1927, Sec. 7235.)

SECTION 1417. REFUNDING ERRONEOUS TAX.—The board of supervisors shall direct the treasurer to refund to the taxpayer any tax or portion thereof found to have been erroneously or illegally exacted or paid, with all interest and costs actually paid thereon. In case any real estate subject to taxation shall be sold for the payment of such erroneous tax, interest or costs, the error or irregularity in the tax may be corrected at any time provided in this chapter but such correction shall not affect the validity of the sale or the right or title conveyed by a treasurer's deed, if the property was subject to taxation for any of the purposes for

which any portion of the taxes for which the land was sold was levied, and the taxes were not paid before the sale, or the property redeemed from sale.

(LAWS OF THE THIRTY-SEVENTH GENERAL ASSEMBLY.)

CHAPTER 343.

TAXATION.

SECTION 1. Rate of taxation—adjusted taxable value. That hereafter in all taxing districts in the state, including townships, school districts, cities, towns and counties, when by law then existing the people are authorized to determine by vote, or officers are authorized to estimate or determine, a rate of taxation required for any public purpose, such rate shall in all cases be estimated and based upon the adjusted taxable valuation of such taxing district for the preceding calendar year.

SECTION 2. Amounts certified in dollars, not by rate. That when any authorized tax rate within any taxing district of the state, including townships, school districts, cities, towns and counties, shall have been thus determined as provided by law, the officer or officers charged with the duty of certifying said authorized rate to the county auditor or board of supervisors, shall, before certifying the same, compute upon the adjusted taxable valuation of such taxing district for the preceding calendar year (not including moneys and credits and other moneyed capital taxed at a flat rate, as provided in section thirteen hundred ten (1310) supplement to the code, 1913), the amount of tax said rate will raise, stated in dollars, and shall certify said computed amount in dollars, and not by rate, to the county auditor and board of supervisors.

SECTION 3. Computation of rate. When the valuations for the several taxing districts shall have been adjusted by the several boards, as provided by law, for the current year, the county auditor shall thereupon compute and spread upon the records such a rate, not exceeding the rate authorized by law, on said adjusted taxable valuations for the current year (not including moneys and credits and other moneyed capital, taxed at a flat rate, as provided in section thirteen hundred ten (1910), supplement to the code, 1913) as shall raise the amount required for each taxing district within the county, as theretofore determined under the provisions of this act, and no larger amount; provided, however, that if in adjusting the rate to be levied in any taxing district to conform to this act, such rate shall make necessary the levying of a fraction of a mill in excess of one-half of one-tenth of a mill, said fractional excess may be computed as one-tenth of a mill, which latter shall be the smallest required to be spread upon the tax lists for any purpose except rates applicable to state purpose, provided, however, that nothing herein shall be construed as interfering with the right of any taxing district to receive its due proportion of the taxes on moneys and credits and other moneyed capital taxed at a flat rate as provided in section thirteen hundred ten (1310), supplement to the code, 1913.

SECTION 4. Record of rates. On the determination by the auditor of the necessary rates as herein directed, it is made his duty to enter a record of such rates for each taxing district upon the permanent records of his office in a book to be kept for that purpose.

FILE COPY

OCT 8

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 15.

IOWA-DES MOINES NATIONAL BANK, *Petitioner*,

vs.

E. R. BENNETT, Chairman of the Board of Supervisors of Polk County, Iowa, et al., *Respondents*.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA.

REPLY BRIEF OF PETITIONER.

J. G. GAMBLE,
A. B. HOWLAND,
500 Bankers Trust Building,
Des Moines, Iowa,
Counsel for Petitioner.

INDEX.

Page

Summary of Reply Argument.

I. Mandamus was the exclusive remedy available to petitioner under the decisions of the Supreme Court of Iowa ____ 2

II. Appeal from the Board of Review was a totally inadequate remedy; and in so far as the decision of the Iowa Supreme Court holds that petitioner was remitted to its remedy by appearance before and appeal from the Board of Review, the laws of Iowa as so construed deny petitioner the equal protection of the law and deprive petitioner of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States ____ 18

III. & VI. The record discloses, and the opinion of the Iowa Supreme Court concedes, that during the years involved there were large and material amounts of moneyed capital, within the meaning of Section 5219 of the Revised Statutes of the United States, which were taxed at only five mills on the dollar, while the shares of petitioner were taxed at rates from five to seven times greater, thus clearly violating the restrictions found in the statute ____ 18

IV. It is not necessary to establish that national banks and competing investors solicited the same customers for the same loans or investments to show a violation of the restriction contained in Section 5219. It is enough if the evidence clearly discloses that competing individuals or corporations engaged in seeking and securing in the same locality capital investments of the character in which national banks customarily deal ____ 40

V. The shares of stock in corporations entering into substantial competition with petitioner constitute "moneyed capital" within the meaning of Section 5219, Revised Statutes. Holders of such shares are individual citizens within the meaning of the statute ____ 41

VI. The evidence discloses that the business of making real estate mortgage loans constituted a part of the business of national banks in the City of Des Moines and in the State of Iowa. The business of making mortgage loans on real estate within the same territory is therefore competitive ____ 37

VII. The legislature of Iowa has by Section 1310 Code Supplement 1913 exercised its power of classification for purposes of taxation, and such classification is binding upon the taxing officers of the State. A deliberate, system-

atic, general, and intentional method of taxation whereby the classification made by the legislature is ignored denies both state and national banks the equal protection of the law 42

VIII. The acts of the Auditor of Polk County were the acts of the State, and the record affirmatively discloses an intentional, general, habitual, and systematic method of taxation whereby a gross discrimination against petitioner arose which violated the provisions of Section 5219, Revised Statutes, and the Fourteenth Amendment to the Constitution of the United States 43

IX. The suit of Des Moines National Bank v. Fairweather, 263 U. S. 103, was not an adjudication of the cause of action presented by this record 45

X. The taxes upon shares of petitioner were absolutely void because enacted in violation of the federal law and Constitution of the United States. When taxes are void, a taxpayer has the right to have them refunded, and the fact, if established, that the payments were voluntarily made, is immaterial 53

XI. Petitioner was not guilty of laches. The taxing authorities did not change their position in reliance upon any act of petitioner and were at all times advised that petitioner claimed the taxes were illegal and void. The action to compel a refund was instituted within the time prescribed by the laws of the state, and the equitable doctrine of laches is wholly inapplicable 45

XII. The record does not disclose any unconscionable or inequitable conduct on the part of petitioner in connection with the transactions involved which would deprive it of its legal and equitable rights. There was no duty on the part of petitioner to require a purchaser of a security to record his assignment from the bank; the equitable maxim that "he who comes into equity must come with clean hands" will not be extended to include the general moral status or conduct of petitioner 54

XIII. The taxes involved were paid by petitioner out of its own funds, and the claim for refund is therefore the property of petitioner 56

XIV. Corporations in Iowa are taxed upon the net amount of capital invested in the business; and under the moneys and credits statute good faith debts may be deducted from the assessment of individual taxpayers. Deposit liabilities of petitioner constitute a debt 61

XV. The Iowa statute of limitations on actions of this character is five years from the date of payment of the taxes ____ 62

XVI. The record shows the character of the business carried on by petitioner as of the date of assessment and the date of payment of the taxes herein involved. No further showing was necessary. ____ 62

XVII. & XVIII. The judgment of the Iowa Supreme Court became a finality before the writ was applied for in this Court. Petitioner was not required to file a petition for rehearing after the Supreme Court of Iowa entered a final judgment disposing of the case ____ 63

INDEX TO CASES CITED.

	Page
Alt v. Young, 181 Iowa 1260	48
Atkins v. Anderson, 63 Iowa 739	51
Barney v. New York, 193 U. S. 430	43
Brown v. Holden, 120 Iowa 191	51
Campbell v. County of Polk, 3 Iowa 467	7
Carpenter v. Shaw, 280 U. S. 363	54
Clark v. Board of Directors, 24 Iowa 266	11
Collins v. Board, 158 Iowa 322	12
Commercial Nat. Bank of Miles City v. Custer County, 275 U. S. 502	39
Cromwell v. County of Sac, 94 U. S. 351	47
Cummings v. Merchants Nat. Bank of Toledo, 101 U. S. 153	44
Commercial Nat. Bank v. Board of Supervisors, 168 Iowa 501	10, 16, 54
Des Moines National Bank v. Fairweather, 263 U. S. 103	46, 47
Dickey v. County of Polk, 58 Iowa 287	52, 53
Evansville Nat. Bank v. Britton, Treasurer, 105 U. S. 322	41
First Nat. Bank of Guthrie Center v. Anderson, 269 U. S. 341	2, 35, 40
First Nat. Bank of Hartford v. Hartford, 273 U. S. 548	29, 36, 38, 39, 40, 41
First Nat. Bank v. Anderson, 196 Iowa 587	35, 40
Farmers Ins. Co. v. Linn County, 202 Iowa 444	51
Hawkeye Co. v. Marion, 110 Iowa 468	54
Home Tel. & Tel. Co. v. Los Angeles, 227 U. S. 278	44
Hospers v. Wyatt, 63 Iowa 264	7
Interstate Com. Com. v. Waste Merchants Assn. of New York, 260 U. S. 32	5
Iowa Railway Land Company v. Woodbury County, 64 Iowa 212	15
Lowman v. Des Moines County, 29 Iowa 310	53
Littell v. Webster County, 152 Iowa 206	12
Merchants Nat. Bank v. Richmond, 256 U. S. 635	28, 39, 41
Mercantile Nat. Bank v. Mayor of New York, 121 U. S. 138	29, 32, 41

Minnesota v. First Nat. Bank of St. Paul, 273 U. S. 561 ..... 34, 38, 39
Montana Nat. Bank v. Yellowstone County, 276 U. S. 499 39
Munn v. Des Moines National Bank, 18 Fed. (2d) 269 ..... 38, 49
Nesbit v. Independent District of Riverside, 144 U. S. 610 48
Newberry v. Newberry, 114 Iowa 704 51
Preston v. Board of Education, 124 Iowa 355 12
Rice v. Walker, 44 Iowa 458 14
Raymond v. Chicago Union Traction Co., 207 U. S. 20 ..... 43, 44
Reagan v. Farmers Loan & Trust Co., 154 U. S. 362 44
Radford v. Myers, 231 U. S. 725 48
Richards v. Wapello County, 48 Iowa 507 53
Southern Railway Co. v. Clift, 260 U. S. 316 64
State v. Cahill, 131 Iowa 286 64
Slimmer v. Chickasaw County, 140 Iowa 448 51
Sunday Lake Iron Co. v. Wakefield, 247 U. S. 350 44
Sioux City Bridge Co. v. Dakota County, 260 U. S. 441 45
Steele v. Madison County, 198 Iowa 902 5
Scripture v. Burns, 59 Iowa 70 12
Sullivan v. Robbins, 109 Iowa 235 12
Taylor v. L. & N. R. R. Co., 88 Fed. 350 45
United Shoe Machinery Co. v. United States, 258 U. S. 451 48
Ward v. Love County, 253 U. S. 17 54
Woodbury County v. Talley, 147 Iowa 498 13

INDEX TO STATUTES CITED.

Page

Code of Iowa 1927
Sec. 5123 5
Sec. 5124 6
Sec. 5130 5
Sec. 7235 ..... 5, 9, 10, 13, 14, 52
Sec. 12456 10
Sec. 12880 63
Sec. 12881 63
Sec. 12882 64
Code Supplement 1913
Sec. 1310 ..... 41, 42, 55
Sec. 1311 61
Code of 1897
Sec. 1417 ..... 5, 6, 9, 53
Revised Statutes of United States
Sec. 5219 ..... 11, 33, 35, 39, 41, 44

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 15.

IOWA-DES MOINES NATIONAL BANK, *Petitioner*,

vs.

E. R. BENNETT, Chairman of the Board of Supervisors of Polk County, Iowa, et al., *Respondents*.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA.

REPLY BRIEF OF PETITIONER.

The brief of respondents filed herein upon the main issues involved, does not in the least purport to justify or sustain the majority opinion of the Supreme Court of Iowa in this case on the grounds upon which the majority opinion is based.

On the contrary, respondents have presented numerous propositions and contentions, all of which were presented to the court below, and all of which, with the exception of one relating to only one branch of the case, were ignored by the majority opinion, and answered and denied by the minority.

We feel, however, that we may be of aid to the Court by replying to the Propositions in the order in which they are stated in the brief of respondents.

I.

Proposition I in respondents' brief (Pages 59 to 81) is subdivided into several subjects, and we will consider them in the order stated.

As to the Claim that Mandamus was not the Proper Remedy.

Insofar as the claim of petitioner is based upon the acts of the county auditor of Polk County, Iowa, in changing the assessments of owners of shares of stock in domestic corporations, and applying thereto the five mill levy, resulting as claimed in a gross discrimination in favor of such capital, the Supreme Court of Iowa, in both the majority and the minority opinions, has treated the case as one properly the subject of an action of mandamus, which, by statute, is declared to be an action in equity.

Therefore, the case in this aspect is not one of jurisdiction, but one for consideration on its merits. And it seems to us the language employed by this Court in *First National Bank of Guthrie Center v. Anderson*, 269 U. S. 341 must necessarily conclude and dispose of this contention, for there it is said:

> "The Supreme Court of the State treated the case as cognizable in equity, and perceived no obstacle to a consideration of the merits as displayed in the petition. In this that Court was proceeding within limits where the state laws and practice were controlling, and its action is not open to revision here."

But, considering this contention of respondents aside from this rule, we can find no more convincing statement than that employed by the minority of the Supreme Court of Iowa in its decision (Record, 1369 to 1371) as follows:

"The appellees also contend that mandamus is not the proper remedy. The holdings of this court are against this contention. See *Steele v. Madison County*, 198 Iowa, 902; *Murphy v. Berry*, 200 Iowa 974; *Home Savings Bank v. Morris, et al.*, 141 Iowa 560; *Eyerly v. Jasper County*, 72 Iowa 149; *Beecher v. County of Clay*, 52 Iowa 140; *The Dubuque & Sioux City R. Company v. The Board of Supervisors*, 40 Iowa 16; *Fort Madison Security Company v. Maxwell*, 202 Iowa 1346; *Farmers Insurance Company v. Linn County*, 202 Iowa 444; *The Commercial National Bank of Council Bluffs v. Board of Supervisors*, 168 Iowa 501; See also Section 1417 of the 1897 Code (now Section 7235, Code of 1927), which is the statutory authority under which the appellants bring this action. It provides:

> 'The Board of supervisors shall direct the treasurer to refund to the taxpayer any tax or portion thereof found to have been erroneously or illegally exacted or paid, with all interest and costs actually paid thereon'.

It must be borne in mind that under Section 5219 of the Revised Statutes of the United States, the taxation of National Banks shall not be at a greater rate than upon other moneyed capital. If the shares of stock in the alleged competitive institutions is moneyed capital within the meaning of the law, then the action of the county auditor in changing the assessment of their stock from personal property—from 'corporate stock'—to 'moneys and credits' under the five mill statute, and leaving the appellants' assessments on 'corporate stock' at the consolidated levy rate, compels the appellants to pay at a greater rate than, and from five to seven times as much as the competitive institutions, and thereby makes the tax which the appellants were compelled to pay an illegal tax—in contravention of the provisions of Section 5219 of the Revised Statutes of the United States; and when the appellants were compelled to pay said amount, it was illegally and erroneously exacted. In *Commercial National Bank v. Board of Supervisors*, 168 Iowa 501, we declared:

'Such an order (to refund) is essential to repayment by the treasurer and to enter it, in a proper case, is the mandatory duty of the board of supervisors.'

In *Home Savings Bank v. Morris*, 141 Iowa 560, we find the following pronouncement:

'It seems to us that the statute (Section 1417 of the Code of 1897) itself fully answers the appellants' contention. It says in so many words just what shall be done. It says that the treasurer shall be directed to refund the tax illegally paid,' etc.

In the recent case of *Steele v. Madison County*, 198 Iowa 902, an action at law was brought by a National Bank to recover from the County taxes alleged to have been illegally exacted, because of a violation of the restriction contained in Section 5219 of the Revised Statutes. We there said:

'* * * that if the board of supervisors refuse to do its duty and order a refund of the portion of the taxes erroneously or illegally exacted, an action in mandamus will lie to compel such refund.' (Citing numerous cases.)

Indeed, if the taxing authorities, through the action of the county auditor, so fixed matters that, in contravention of the provisions of Section 5219 Revised Statutes of the United States, an amount has been exacted in taxes upon the shares of stock of the National Banks at a greater rate than upon the shares of stock of the alleged competitive institutions, and are not now entitled to a remedy in mandamus to put them on equality with the competitive institutions, which have paid their taxes based on a lesser rate, the appellants would be remediless. See, as bearing on this proposition, *Greene v. Louisville & I. Railroad Co.* (U. S.) 61 L. Ed. 1280; *Sioux City Bridge Company v. Dakota County* (U. S.) 67 L. Ed. 340."

As to the Claim that Petitioner Sought to Use the Writ of Mandamus as a Means of Appeal or as a Writ of Error.

Petitioner sought by this action to enforce a right expressly declared by statute (Section 1417, Code of Iowa, 1897, as amended) by employing the means, viz., a statutory action of mandamus, declared to be the exclusive remedy by the Supreme Court of the State of Iowa. *Steele v. Madison County*, 198 Iowa 902, and cases hereinbefore cited. Therefore, we do not have a case involving the extraordinary common law remedy of mandamus, and the quotations as well as the cited case of *Interstate Commerce Commission v. Merchants Association of New York*, 260 U. S. 32, have no application.

As to the Claim that Petitioner Sought to Attack the Decision of the Board of Supervisors in a Collateral Manner.

This contention is necessarily predicated upon the premise that the board of supervisors acted in a judicial capacity. This assumption is necessarily erroneous, because in acting upon claims for the refund of taxes the board of supervisors acts purely in an administrative capacity as an auditing board, and not judicially. The board of supervisors is by statute made the administrative body, charged with the management of the business and governmental affairs of the county. Among the general powers conferred upon the Board by statute, is the power "to examine and settle all accounts, all receipts and expenditures of the county, and to examine, settle, and allow all claims against the county, unless otherwise provided by law". (Section 5130, Code of Iowa, 1927.)

Section 5123 provides as follows:

"Claims generally. Claims filed shall be numbered consecutively in the order of filing, and shall be entered

on the claim register alphabetically, so as to show the date of filing, the number of the claim and its general nature, the name of the claimant and the action of the board thereon, stating, if allowed, the fund upon which allowance is made. A record of the allowance of claims at each session of the board shall be entered on the minute book by reference to the numbers of the claims as entered in the claim register."

Section 5124 is as follows:

"Unliquidated claims. All unliquidated claims against counties and all claims for fees or compensation except salaries fixed by statute, shall, before being audited or paid, be so itemized as to clearly show the basis of any such claim and whether for property sold or furnished the county, or for services rendered it, or upon some other account, and shall be duly verified by the affidavit of the claimant, filed with the county auditor for presentation to the board of supervisors; and no action shall be brought against any county upon any such claim until the same has been so filed and payment thereof refused or neglected."

Section 7235 previously Section 1417 Code of 1897 does not appear in the chapter relating to the duties of the Board of Supervisors, but is found in the chapter relating to the collection of taxes. It provides simply that the Board shall direct the treasurer to refund any tax or portion thereof found to have been erroneously, or illegally exacted or paid. No method of procedure in connection with claims for refunds of taxes, as distinguished from other classes of claims filed with the Board, is provided by statute. Sections 5123 and 5124 clearly contemplate that the Board of Supervisors shall not act in a judicial capacity in allowing or disallowing claims, for it is expressly provided that suit may be brought on unliquidated claims after presentation thereof to the Board.

Nor do we find anything in Section 7235 which indicates an intention on the part of the legislature that in passing on claims for refunds of illegal taxes, the Board is vested with

jurisdiction to determine the legality or illegality of the taxes.

The Iowa Supreme Court has on several occasions rejected the very theory now advanced by counsel for the respondents. The early case of *Campbell v. County of Polk*, 3 Iowa 467, arose when the management of county affairs was vested in an officer known as the county judge. The county judge was also given probate jurisdiction, performed many of the functions now vested in the clerk of the District Court, and was the managing officer charged with the administration of county affairs. The county had occasion to purchase a tract of land. Certain commissioners had negotiated the terms of the purchase and had paid a portion of the purchase price. By mistake, the county judge issued warrants in payment of the full purchase price. An action was brought against the county on these warrants, and the county set up in defense that the warrants were without consideration, and issued through mistake. The trial court sustained a demurrer to this answer on the ground that in issuing the warrants, the county judge acted in a judicial capacity, and that his determination that the warrants should be issued was not subject to a collateral attack. The Supreme Court reversed the case holding that while the county judge exercised many judicial functions, in allowing or rejecting claims against the county, and in issuing warrants, he acted in a purely ministerial capacity, and that his action was open to review at any time.

The leading case in Iowa is that of *Hospers v. Wyatt*, 63 Iowa 264. It there appeared that two men named Ross and Bell had paid the taxes on certain tracts of land for the years from 1866 to 1880 inclusive. It later developed that the taxes were illegal. Ross and Bell presented a demand for refund of the taxes for the fifteen years, to the Board of Supervisors, which allowed the claim, and directed the auditor to issue a warrant, or refunding order. The plaintiff, a taxpayer, brought an injunction action against the auditor to enjoin the

issuance of any warrant covering that portion of the taxes which were barred by the statute of limitations, and certain items, which the plaintiff alleged Ross and Bell had no right to recover. The trial court enjoined the county auditor from issuing the warrants. On appeal it was contended that the Board of Supervisors in allowing the claims for refund acted in a judicial capacity, and that the propriety of the board's action could not be questioned by an injunction suit. It will thus be seen that the issue of law was the identical issue raised by counsel for the appellees in this case. In passing upon the question in an opinion by Mr. Justice Seevers, the Iowa court said:

> "It will be conceded, if the board acted judicially, that injunction is not the proper remedy. That the board of supervisors, in relation to many matters, act judicially, will also be conceded; but that they do so in the allowance of claims against the county cannot, we think, be the rule. If this is so, then the determination of the board, while it may not have the force and effect of a judgment in so far as relates to its enforcement, must of necessity be final and conclusive as an adjudication, so far as the amount allowed is concerned, if the same is not annulled or set aside in some direct proceeding, such as an appeal or certiorari. It has been held that the allowance of a claim by a city or school district by the proper auditing board thereof, and a warrant issued therefor on the treasurer, is not final and conclusive as an adjudication, but that, in an action brought on such warrant, the city or school district may plead and establish that the allowance of the claim was illegal and not authorized by law. *Clark v. The City of Des Moines*, 19 Iowa, 199; *Eastman, Bovee & Co., v. The Dist. Twp. of Lyon*, 40 Id. 438.
>
> In *Campbell v. Polk County*, 3 Iowa, 467, which was an action brought on county warrants, it was pleaded as a defense that they were issued without consideration and through mistake. To this defense a demurrer was filed, on the ground that, when the county judge had once passed upon a matter within his jurisdiction, that action was final, unless appealed from or impeached for fraud.

The demurrer, it was held, had been erroneously sustained. And the reasoning of the court in determining the question before it favors strongly, to say the least, the position that the acts of the county judge in allowing a claim against the county was not a judicial act, except that an appeal was allowed therefrom, and to that extent it must be so regarded.

The powers of the board of supervisors in relation to the allowance of claims against the county are not greater than those of the county judge; (Code of 1851, Sec. 106;), and therefore, the same rule must prevail. If the allowance of the claim constitutes an adjudication and judgment, it must, as has been said, have the force and effect of a judgment, so as to preclude all inquiry as to its correctness. The warrant issued thereon, should, if the judgment is conclusive, have the force and effect of an execution; but we have seen that this is not so. Now, if the warrant can be impeached for illegality, as not authorized by law, it seems to us that it necessarily follows that the allowance of the claim may be impeached in like manner, and for the same causes."

The foregoing authorities amply demonstrate that in allowing or rejecting claims for refunds of taxes under Section 7235, the Board of Supervisors act in a purely administrative capacity and do not exercise judicial functions.

As to the Claim that Petitioner Cannot Maintain This Action Because the Proper Parties are not Before the Court.

This contention is based upon the claim that the State of Iowa, Polk County, City of Des Moines, and the Independent School District of Des Moines, are affected by the result, and are not as such made parties to the action.

The contention overlooks the provisions of Section 1417, of the Code of Iowa, 1897, which was in force at the times involved herein, (now Section 7235, Code of Iowa, 1927), which requires the board of supervisors to direct the treasurer to refund to the taxpayer any tax or portion thereof found

to have been erroneously or illegally exacted or paid, with interest and costs actually paid thereon; and also the fact that the Supreme Court of Iowa has declared the sole and exclusive remedy to be by mandamus upon the officers named in this statute.

As to the Claim that Petitioner's Remedy, if any, is at Law.

This contention is based upon the claim that only an action in certiorari may be maintained. This claim is not sustained by, and is contrary to, the decisions of the Supreme Court of Iowa hereinbefore referred to.

The writ of certiorari can only be used to review the proceedings of an inferior board or body exercising judicial functions.

Code of Iowa, 1927, Section 12456, provides:

> "The writ of certiorari may be granted when authorized by law, and in all cases where an inferior tribunal, board, or officer *exercising judicial functions is alleged to have exceeded his proper jurisdiction, or is otherwise acting illegally* * * *". (Italics ours.)

Under this statute the writ of certiorari is not available to control the action of administrative bodies, and as the board of supervisors in allowing or disallowing claims for refund under this statute do not act in a judicial capacity, there can be no remedy by way of certiorari.

No authorities dealing with the subject of tax refunds are cited by counsel for the respondents in support of their contention, except the case of *Commercial National Bank vs. Board of Supervisors*, 168 Iowa, 501. This case squarely holds that Sec. 7235 imposes a mandatory duty upon the Board of Supervisors to make refunds of taxes illegally exacted. The facts of that case were that the Commercial National Bank of Council Bluffs filed with the Board of Super-

visors of Pottawattamie County a claim for a refund of taxes exacted upon the shares of a National Bank, under a statute subsequently declared invalid, because in violation of Section 5219 of the Revised Statutes of the United States. The Board of Supervisors denied the refund and the Bank sued in mandamus. The Iowa Court held that mandamus was the proper remedy, that the Board acted in a purely ministerial capacity, and that it was the mandatory duty of the Board to make the refund sought. We quote the following from the opinion in that case:

> "II. The duty of the board of supervisors is equally explicit. Having ascertained that the taxes have been illegally or erroneously exacted or paid, the statute prescribes precisely what shall be done, i. e., the board shall direct the treasurer to refund them to the taxpayer. Such an order is essential to repayment by the treasurer and to enter it, in a proper case, is the mandatory duty of the board of supervisors. That there is no adequate remedy at law sufficiently appears from the cases cited and as the contention is that the board of supervisors omitted a duty the performance of which the law enjoins, mandamus is the proper remedy. Section 4341, *et seq.*, Code; *Eyerly v. Jasper Co., supra;* See *Beecher v. County of Clay*, 52 Iowa 140; *The Dubuque & S. C. Ry. Co. v. Board of Supervisors*, 40 Iowa 16."

We submit that the case supports the contention of the petitioner and is not available to the respondents as an authority.

The next case cited is that of *Clark v. Board of Directors*, 24 Iowa 266. In this case a writ of mandamus was issued by the trial court ordering the defendants to enroll the plaintiff in a particular public school in the district in which she resided. Plaintiff was a colored child who had been denied admission to a particular school, because of an attempt on the part of the Board to establish a school for colored children exclusively. The court says that it was the mandatory duty

of the board of directors to permit the plaintiff to attend the school in the district wherein she resided, and that no discretion was vested in the Board with reference to the segregation of races in the public schools. The case does not support the contention of the respondents.

In *Preston v. Board of Education*, 124 Iowa, 355, it appeared that the Board of Directors of an independent school district had denied the plaintiff the right to attend the school without payment of tuition on the ground that she was a non resident of the district. The defendants demurred to the petition because the Board were vested with power to determine the residence of the plaintiff as a fact question, and on the further ground that the plaintiff had an adequate remedy at law by way of appeal to the county superintendent of schools from the decision of the board of directors. It was held that the decision of the board could not be reviewed in an action in mandamus, and the opinion concludes as follows:

> "Conceding now, that the Board reached an erroneous conclusion, it is clear that the remedy was by review of the facts and the judgment predicated thereon. This the law provides for in the way of an appeal to the county superintendent of schools."

Of course where there is an adequate remedy by way of appeal from the decision of an inferior tribunal, the remedy in mandamus will not lie, and as there was a right of appeal to the County Superintendent of School to correct the erroneous decision of the Board of Directors the remedy of mandamus was not available to plaintiff.

The cases of *Scripture v. Burns*, 59 Iowa, 70, *Sullivan v. Robbins*, 109 Iowa, 235, *Littell v. Webster County*, 152 Iowa, 206, and *Collins v. Board*, 158 Iowa, 322, are cited by counsel for the respondents in support of their contention that the instant case constitutes a collateral attack upon a judgment of the Board of Supervisors. None of these cases support the

argument of counsel. They are merely cases in which the Boards acted in an administrative capacity but were vested with a discretion as to the performance or non-performance of certain acts. Thus in *Littell v. Webster County, supra,* it is held that mandamus will not lie to compel the engineer and Board of Supervisors to accept an improvement under a drainage contract. These cases have no bearing upon the question before the Court for decision.

The case of *Woodbury County v. Talley,* 147 Iowa, 498, is apparently strongly relied upon by counsel for respondents. The facts in that case were that the Sioux City Stock Yards Company had been assessed as a merchant and no assessment had been returned against the stockholders of the corporation upon their shares of stock. The real estate was separately taxed. A tax ferret, employed to discover omitted property, requested the treasurer to make and enter an assessment upon the shares as omitted property. The treasurer after notice to the corporation held a hearing and entered his decision in writing, stating that he was without authority to make an assessment upon the shares as omitted property. The Iowa Supreme Court held that mandamus was not available to review the determination of the County Treasurer, as he acted in a purely judicial capacity, and was clothed with the power of deciding whether the property was omitted property, and whether it was properly subject to assessment and taxation. As the treasurer was acting judicially, and had authority to determine the question in the first instance, mandamus would not lie to control the exercise of that jurisdiction. The case is clearly distinguishable from the case at bar because in passing upon claims for refunds of taxes under Section 7235 the Board of Supervisors acted as an administrative auditing board, not as a judicial tribunal, clothed with the authority of determining the legality or illegality of the taxes.

A claim for refund of taxes is a claim upon the tax funds, and as the County Treasurer is the officer collecting

taxes, and as they are disbursed by him under the order of the Board of Supervisors, the statute requires that the claim be made to the Board, but that does not mean that in allowing or rejecting the claim the Board acts judicially. They act in the same capacity in allowing or rejecting a claim under Section 7235 as in allowing or rejecting any other claim against the various county funds.

As to the Claim that Mandamus Will Not Lie to Compel the Payment of Money by Public Officers if There Is No Fund Out of Which It Can Legally be Paid.

In support of their contentions, counsel cite two Iowa cases. The first is that of *Rice v. Walker*, 44 Iowa, 458, which states the rule that an officer will not be required by writ of mandamus to do that which it is impossible for him to do, even though he has put it beyond his power by his own action. The facts of that case were briefly as follows: The plaintiff procured a judgment for personal injuries against the City of Des Moines. In the years 1874 and 1875 the city levied a tax of eight mills for a judgment fund, and realized therefrom for the year 1874 $31,941.00, and at the time of the trial had not yet collected the money for the taxes of the year 1875. The City Council had diverted about $10,000 from the judgment fund to pay interest on bonds, and $17,000 had been transferred therefrom to the general fund of the city, and largely exhausted in payment of general expenses. The trial court awarded a peremptory writ of mandamus directing the defendant as treasurer of the City of Des Moines to forthwith pay the plaintiff's judgment. It was held that a writ of *mandamus* should not be issued against a public officer to compel the performance of an act which had become impossible. We quote the following from the opinion of the court:

"The judgment of the Circuit Court should be so modified that a writ of mandamus issue, commanding the defendant to pay to plaintiff his said judgment with interest and costs, so far as he may be able to do so with funds in the city treasury collected either from the tax of 1874, levied 'for judgment fund,' or from the tax of 1875, levied 'for city judgment tax,' whether the same may have been transferred or credited to any other fund or not.

The injunction restraining the diversion of said taxes was properly granted."

The foregoing recital shows that the facts were not comparable to those presented by this record, and the conclusion of the court supports our contentions rather than those of counsel for respondents. The case of *Iowa Railway Land Co. v. Woodbury County*, 64 Iowa 212 is equally inapplicable to the present controversy. That was an action at law against a county to recover taxes illegally exacted. It affirmatively appeared that a large portion of the taxes had been distributed to the various governmental sub-divisions. The court says:

"It is the tax which has been illegally or erroneously exacted which is to be refunded. The clear meaning of this is that the money which is to be returned to the tax payer is to be taken from the particular fund or funds into which the illegal tax went when it was collected. The section clearly does not impose on the county the burthen of paying any portion of such taxes out of its general funds, except the amount thereof which has gone into that fund. The county is not made liable for any portion of the tax illegally or erroneously collected, except the amount which is collected for its use. But the duty imposed on the board of supervisors is to order the treasurer to refund to the tax payer, from each of the separate funds for the benefit of which the tax was collected, the amount thereof which is found to have been illegally or erroneously exacted from him. And any judgment rendered against the county on account of the collection of such tax should be satisfied by moneys

taken in proper proportion from the several funds into which the tax went when collected."

It is quite apparent from this opinion that the case supports our contentions rather than those of respondents. It specifically holds that mandamus is the proper remedy to compel refunds of taxes illegally exacted, and that such remedy is exclusive when the taxes have been distributed to the various governmental sub-divisions. It is quite apparent that these authorities do not sustain the contention of counsel that proof of the existence of a fund sufficient to satisfy the claim is necessary in a mandamus action. There are some cases to which the rule stated by counsel might be applicable. Thus, if in this case petitioner were demanding the issuance of writs of mandamus compelling the County Treasurer to forthwith pay certain claims or warrants, the rule would apply. In this case petitioner does not seek a writ commanding the respondents to pay the refunds. The petitioner prays that a writ issue compelling the Supervisors to order the payment, or to direct the auditor to draw a warrant on the treasurer for the proper amount. If the warrant or order is issued petitioner may then be faced with the necessity of invoking the remedy of mandamus to compel the levy of a tax to pay the warrants or orders. But that question is not now involved.

It was the intention of the legislature that the Board of Supervisors should order refunds under this section, to be made from the several funds to which the taxes were originally distributed, and the fact that distribution may have been made of the tax money originally paid does not in any sense affect the right of the taxpayer to have the same repaid from such funds. The opinion of Justice Ladd in *Commercial National Bank v. Board of Supervisors*, 168 Iowa 501 clearly shows this intention. We quote the following from the opinion:

"The manifest design of this statute is that the board of supervisors first ascertain whether the taxpayer is entitled to be reimbursed for taxes illegally or erroneously exacted and if so, that the treasurer be directed to repay the same from the several funds to which these have passed. Such was the interpretation given in *Iowa Ry. Land Co. v. Woodbury Co.*, 64 Iowa 212, where recovery against the county was denied, and this decision was followed in *Eyerly v. Jasper County*, 72 Iowa 149. It is the duty of the treasurer only to repay from the particular funds into which the taxes have gone and, when necessary, to ascertain by computation the amount to be taken from each. *District Township of Spencer v. District Township of Riverton*, 56 Iowa 85. The result attained is the restoration of the moneys illegally or erroneously paid by the taxpayer, and each fund continues as though these had never been collected. The remedy is perfect."

If proof of the existence of a fund is necessary in a case of this character, the fact remains that the record contains an abundance of proof of the existence of such a fund.

The record affirmatively discloses that after the filing of the claims for refunds with the Board of Supervisors, the County Treasurer collected and remitted to the State of Iowa, to the City of Des Moines, and to the Independent School District millions of dollars, all of which might legally have been applied in payment of petitioner's claim for refunds. In the year 1926 the county treasurer remitted to the treasurer of the Independent School District of Des Moines $2,972,351,08, to the treasurer of State $408,034.21 for state general revenue and for soldiers bonus $94,069.59. The treasurer retained out of the tax moneys collected by him in 1926 for county purposes $1,333,597.28; to the Treasurer of the City of Des Moines he paid $2,724,250.82. Correspondingly large amounts were paid to the Treasurer of State, the Treasurer of the Independent School District, and the Treasurer of the City of Des Moines in the year 1927. Exhibit 1765 is a tabulation prepared by the deputy county auditor of Polk

County. It shows that in the taxing district of the City of Des Moines $424,295 would be collected for state revenue in the year 1928; $1,197,457.00 for county purposes; $2,737,-872.00 for the City of Des Moines, and $3,038,901.00 for the Independent School District. We submit therefore that the evidence of the petitioner shows without dispute the existence of large sums of money in the hands of county treasurer more than sufficient to meet the claim of the petitioner.

II.

By Proposition II in respondents' brief (Pages 77 to 81) it is contended that petitioner's remedy was by appeal from the local board of review.

The Supreme Court of Iowa by both the majority and minority opinions in this case held that insofar as the assessment of moneys and credits, other than stock in domestic corporations owned by indivduals, was concerned, the petitioner was remitted for its remedy to an appeal from the local board of review. At the same time the opinion of the Supreme Court of Iowa holds that insofar as the assessment of shares of stock in domestic corporations was concerned, petitioner was not remitted to an appeal from the local board of review.

The contentions set forth in this proposition have been fully and completely answered in Subdivision VI of the brief of petitioner filed herein, and we deem it unnecessary to reiterate the argument there advanced.

III and VI.

By Propositions III and VI in respondents' brief (Pages 81 to 119) it is contended that it was not shown by the record that there was in the years involved a substantial amount of moneyed capital, within the meaning of Section 5219 of

the Revised Statutes of the United States, which was subjected to taxation at a grossly favorable and discriminatory rate.

Before proceeding to a consideration of the contentions advanced in respondents' brief, we desire to briefly correct some inaccuracies and omissions in the so-called "Statement of the Evidence" set out at pp. 16 to 42, inclusive of respondents' brief. This statement is neither fair nor complete, and in many instances distorts the actual evidence introduced. We substitute, therefore, the following brief resume of the testimony in place of that found in respondents' brief.

Security Loan & Investment Company. The secretary-treasurer of this company testified that it was engaged in the real estate loan business and handled the purchase and sale of public improvement bonds and certificates, dealt both in farm loan mortgages in central Iowa and in mortgages on residence and business properties in Des Moines, which it sold to purchasers including life insurance companies and individual investors. It purchased and sold municipal and public improvement securities, it financed public improvement contractors, making advancements of funds to enable the contractor to complete the job, and took in payment the municipal securities in which the contractor was paid. It issued debenture bonds which it sold to investors, sold real estate bond issues, and from 1919 to 1922 did a maximum business of $600,000 per year in public improvement securities. Its mortgage loan business amounted to two and one-half or three million dollars per year. The witness did not testify, as set forth on p. 16 of respondents' brief, that "The company also as a habit made loans in excess of fifty per cent of the value. One mortgage would be for the fifty per cent amount, and the second mortgage for the balance. These excesses amounted to $350,000 of the assets." The witness did testify.

"We had some second mortgages among our assets during the four-year period. When we sold the second mortgages we almost always guaranteed them. In some instances we made a loan upon property which seemed a little higher than we wanted to make as a first mortgage, and we would have one note and mortgage representing a first lien, and smaller amounts which were sold subject to the lien of the larger notes. I would say that we had a total of over $300,000 either in the hands of the Company or in the hands of our customers of that character." (R. 206) (See R. 197-215.)

Iowa Investment & Mortgage Company. The president of this corporation testified that the business carried on during the period from January 1, 1919 through 1922 was making real estate first mortgage loans on residence and business property in the city of Des Moines, with very few farm loans. The company sold its loans to investors and kept its capital and surplus invested in such securities. On January 1, 1919 it held $37,273 of mortgage loans. On p. 17 of their brief, counsel purport to quote the testimony of this witness as follows: "We did not make the loans ourselves, but they were Prudential loans made on their mortgage blanks and their notes. We simply handled them as their correspondent." This statement is inaccurate. The witness did testify:

"The Prudential Insurance Company called us correspondents. When they first started with us, we did not advance our own money on their loans, but on account of competition and the time it took for them to close loans and get the money to us, we made an arrangement with them after the loan had been approved and the abstract had been examined, by which we paid out our money and closed the loan, and sent them the papers and they remitted to us. We got the interest on the money until the loan was accepted and approved by the Prudential Company. We charged a commission for handling such loans which was paid by the borrower in each instance." (R. 222.) (See R. 218 to 224.)

Central Iowa Joint Stock Land Bank. The president of this corporation testified that it made first farm mortgage loans in Iowa as prescribed by the Federal Farm Loan Act. It issued bonds which were secured by the deposit of farm mortgages with a government registrar. On January 1, 1920, its statement to the assessor disclosed "Bills Receivable, Mortgages—$771,200". On January 1, 1921 it reported "other credits due or to become due, $1,350,235", and on January 1, 1922 reported "Bonds Outstanding, $1,520,000." (R. 220-224.)

Des Moines Morris Plan Company. The president of this company testified that its business was loaning money. It made loans with two persons as co-signers with the borrower. It purchased paper from automobile dealers secured by liens on automobiles both in Des Moines and in adjacent towns. It purchased trade acceptances from dealers in household appliances, secured by the endorsement of the dealer. It financed dealers in washing machines, vacuum cleaners, sewing machines, and similar articles. The gross volume of automobile paper handled in 1920 approximated $1,000,000 and somewhat lesser amounts in subsequent years. It rediscounted automobile paper in New York, and secured additional funds by the sale of "investment certificates" which drew interest. The volume of household appliance paper approximated $100,000 per year. (R. 248-256.)

Continental Securities Company. The president of this company testified that the business in which it was engaged was largely a first mortgage real estate loan business, making loans on city property in Des Moines and some farm loans in the immediate vicinity of Des Moines. Most loans were on improved real estate, with some loans to finance construction of homes. The company sold its mortgages to investors both locally and in different parts of the country where it had clients. The volume of mortgage loan business transacted was approximately $150,000 to $200,000 per annum. It issued

debenture bonds secured by deposit of mortgages, and purchased securities from public improvement contractors, and financed such contractors in some instances while the work progressed. (R. 257-260.)

Iowa Guarantee Mortgage Corporation. The president of this company testified that it discounted conditional sales contracts covering the sale of automobiles sold on the deferred payment plan. During 1919 and 1920 the company loaned money to dealers in automobiles, secured by warehouse receipts on cars and trust receipts for automobiles in the dealer's possession. On January 1, 1920 the company reported to the assessor "Notes, $347,000". These were automobile notes and trade acceptances. On January 1, 1921 it reported notes of $321,339 of the same character. The volume of transactions handled by this company in the four years in controversy was: 1919—$1,013,940; 1920—$1,179,032; 1921—$411,751; 1922—$606,999. It deposited these securities with the Des Moines Savings Bank & Trust Company as trustee and issued against them collateral gold notes or bonds which were sold to banks in Iowa and Illinois. (R. 261-266.)

Federal Cattle Loan Society. The testimony with respect to this company is correctly stated in respondents' brief, except with respect to Exhibit 1480 the following statement should be eliminated: "The other item, $267,453.31, is stock notes given for corporation stock." (R. 274-280.)

Garner Investment Company. The statement on pp. 24 and 25 of respondents' brief is substantially accurate. (R. 266-272.)

Jesse F. Stevenson Company. The statement on pp. 25, 26, and 27 of respondents' brief is substantially accurate, but we add thereto the following from the testimony of the president:

> "We had some cases in which customers of our institution would leave money with directions as to the

manner of its investment. In some cases the money was received in the way of advance payments for securities with deliveries to be made later. In some cases it was left with carte blanche authority. In such case the money was merged with the funds of the company, and the customer was paid interest." (R. 288.)

Farmers Bond & Mortgage Company. The president of this company testified that it was engaged in the first mortgage loan business on Iowa farm land and Des Moines property. It made farm loans in Central Iowa which it sold to investors. It issued first mortgage certificates which it sold to investors, which certificates were secured by the deposit of mortgages with a trustee. On January 1, 1922, it held mortgage loans and liberty bonds to the extent of $179,200. The statement appearing on p. 28 of respondents' brief—"When the loans were made, the company negotiated them and sold them to insurance companies mostly. Few mortgages were sold to private investors." should be eliminated, and the following substituted therefor:

> "The company negotiated the loans and sold them to insurance companies, or other investors. The city mortgages were sold to individual investors largely, and the farm mortgages to insurance companies." (R. 292.)

The company did a gross volume of business in 1920 to 1922 of about two million dollars.

Motor Finance Company. The statement found in pp. 28 and 29 of respondents' brief is substantially correct. (R. 298-300.)

Union Mortgage & Cattle Loan Company. The secretary of this corporation testified that it engaged in loaning money on Iowa farm lands and making loans on cattle secured by chattel mortgages. It secured its cattle loan paper through country banks. It made some loans to individual borrowers on open notes. On January 1, 1921 it had in its bills receivable account $184,426 and in its mortgage account $1,001,-

946. It sold its securities to private investors and issued and sold some debenture bonds. The secretary testified: "The theory of our Bills Receivable account was a commercial banking business—secured by chattel mortgage sometimes and secured by endorsements." (R. 300, 318-323.)

Bond & Mortgage Company of Iowa. The auditor of this company testified that it was in the investment business, buying and selling bonds, mortgages, notes, and securities. It made first real estate mortgage loans, both farm and city, operated in the City of Des Moines and in nearby towns. It sold city loans to the Metropolitan Life Insurance Company of New York. The volume of business exceeded $400,000. The company also dealt in various types of bonds. It financed public improvement contractors, and purchased improvement bonds at a discount, and it sold these bonds. The volume of business in bonds and municipal improvement securities approximated $1,000,000. It purchased $800,000 to $900,000 of notes. It financed dealers in automobiles by the purchase of notes and contracts secured by liens on automobiles. (R. 308-309.)

Manning Martin Company. The statement on pp. 32 and 33 of respondents' brief is substantially accurate. (R. 307-309.)

Des Moines Joint Stock Land Bank. The statement on pp. 33 and 34 of respondents' brief is substantially accurate, but we add the following: On January 1, 1920 the company reported "Mortgages $1,172,399" and "Liberty Bonds $666,455". On January 1, 1922 the company had $1,600,000 outstanding in farm loan bonds and held $42,400 in Liberty Bonds. (R. 312-313.)

First and Second Mortgage Corporation. The secretary of this corporation described its business as a general investment and brokerage business in investment securities. The company bought and sold mortgage loans, acted as broker or agent in the negotiation of such loans. It did a business of

between two and three million dollars in securities during the four years 1919 to 1922 inclusive. It acted as loan agent for the Des Moines Joint Stock Land Bank, Lincoln Joint Stock Land Bank, Chicago Joint Stock Land Bank, Central Life Insurance Company of Des Moines, and Illinois Merchants Trust Company of Chicago. It dealt in government bonds and in industrial bonds to some extent. It secured an issue of bonds of the LeMars Gravel Company by trading stock subscription notes. (R. 313-317.)

Continental Mortgage & Loan Company. The statement on p. 35 of respondents' brief is substantially accurate. (R. 337-340.)

Des Moines Discount Company. The secretary-treasurer of this company testified that it bought notes, automobile contracts, and loaned money on collateral security. Most of the notes ran from six months to one year. On cross examination the witness testified that the company handled the class of business that the banks did not handle. On re-direct examination he said that the reason that such paper was not handled by banks was because the maturity was a little longer than the banks would want to handle. (R. 341-343.)

Bankers Mortgage Company. The vice-president of this company testified that it dealt in farm mortgages, municipal, public utility, and industrial bonds. The company made loans on Iowa farms direct to borrowers, with whom it got in touch through its stockholders and country bankers. It sold farm mortgage loans to insurance companies and other investors. The company bought entire issues of municipal, county, and school bonds throughout Iowa. It dealt in Liberty Bonds, railroad bonds, and foreign government bonds. It did a business of approximately $1,000,000 during the year 1919. The statement "The company got the loans the bank did not want to make." is incorrect. The vice-president of the company testified: "Some of the banks in the city were not making all of the mortgages at that time that they had at

chance to make, and we frequently got business from one or another of the banks in the city." (R. 343-347.)

United Mortgage Loan Company. The president of this company testified it made loans on real estate, both first and second mortgage, and loaned money on real estate contracts and equities. It also purchased contracts. It sold its loans to individual investors. (R. 349-353.)

Merchants Loan & Investment Company. The statement appearing at pp. 37 and 38 of respondents' brief is fairly accurate, except that the record does not contain the statement: "Stockholders in the Central State Bank, Mechanics Savings Bank, Des Moines National Bank, Central Trust Company, Valley National Bank, and Peoples Savings Bank were stockholders in the company." (R. 349-353.)

State Bond Company. The statement on p. 38 of respondents' brief is substantially accurate.

Polk County Mortgage Company. The statement on pp. 38 and 39 is substantially correct.

Guarantee Mortgage & Finance Company. The statement set out on pp. 40 and 41 of respondents' brief is substantially accurate.

National Investment and Finance Company.—Burns Bros. Company. The auditor of this company testified that the National Investment & Finance Company during 1919 made small loans to individuals, secured by stocks and bonds, and made loans to cattle feeders. It continued this business up until July 1920, when the cattle loan business was discontinued. The company purchased, sold, and held mortgage loans on farms in Iowa and a few in the Dakotas, for investment. The name of the company was changed to Burns Bros. Company in the latter part of 1921. The principal business engaged in by Burns Bros. Company was buying bonds of municipalities, selling them, making loans to individuals, making, purchasing, and selling farm mortgage loans. (R. 745.)

United Cattle Loan & Livestock Company. The assistant to the auditor of this company testified that the principal business of the company was making loans on livestock secured by chattel mortgages. The borrowers resided principally in Iowa. The loans were evidenced by notes running for not to exceed six months. The company loaned chiefly on cattle, but made a few loans on sheep. It rediscounted its paper with banks throughout the state of Iowa. Most of the loans were handled through country banks. It did a gross business of around $1,500,000 in 1920. (R. 743.)

The statements set forth on pages 43 and 44 of respondents' brief as to the banking business of petitioner are not accurate. The petitioner's cashier testified that the bank made loans to farmers who stated that they desired the money for the purchase of cattle to be placed and fed on the borrowers' farms. (R. 501.)

With respect to the loans discounted for the Rockford Cattle Paper & Investment Company, the witness Capps, said:

> "We would have made the same type of loans. I couldn't say we would have made all the loans they made, but we did make the same type of loans that they did." (R. 502.)

The last paragraph on page 44 of respondents' brief is not in accordance with the record. The witness Capps testified:

> "In 1919 the Iowa National Bank financed contractors who were engaged in public improvement work. The bank advanced funds to such contractors for the purpose of defraying the expense of the work, having an agreement with the contractors for the purchase at a stated price of public improvement certificates and bonds which they might receive in connection with the work." (R. 464.)

On cross examination the witness testified: "We have a form of such contract that was generally used." (R. 508, 509.)

At the request of counsel for respondents, Exhibit Z-115 was produced, which was an agreement between petitioner and the Empire Construction Company, relating to the financing of an improvement project, wherein petitioner contracted to accept public improvement securities in payment of the advances. (See R. 509.)

We have not attempted to point out all of the inaccuracies found in respondents' so-called "statement of the evidence". In many instances the statements set forth in respondents' brief were qualified by other statements, so that the same do not fairly state the substance of the testimony.

It is well settled that the term "other moneyed capital" includes investments of individuals in notes, bonds, mortgages, and other securities such as normally enter into the business of banking, as well as shares of stock or other interests in corporations, engaged in the loan and investment business in the same field in which national banks make loans and investments.

Thus in *Merchants National Bank v. Richmond*, 256 U. S. 635, this Court said:

> "By repeated decisions of this court, dealing with the restriction here imposed, it has become established that while the words 'moneyed capital in the hands of individual citizens' do not include shares of stock in corporations that do not enter into competition with the national banks, they do include something besides shares in banking corporations and others that enter into direct competition with those banks. They include not only moneys invested in private banking, properly so called, but investments of individuals in securities that represent money at interest and other evidences of indebtedness such as normally enter into the business of banking."

In *First National Bank of Hartford v. City of Hartford*, 273 U. S. 548, Mr. Justice Stone, speaking for this Court, uses the following language:

> "Our conclusion is that Section 5219 is violated wherever capital, substantial in amount when compared with the capitalization of national banks, is employed either in a business, or by private investors in the same sort of transactions as those in which national banks engage and in the same locality in which they do business."

And from another point in the same opinion, we quote:

> "Competition may exist between other moneyed capital and capital invested in national banks, serious in character and therefore well within the purpose of Section 5219, even though the competition be with some but not all phases of the business of national banks. Section 5219 is not directed merely at discriminatory taxation which favors a competing banking business. Competition in the sense intended arises not from the character of the business of those who compete but from the manner of the employment of the capital at their command. No decision of this court appears to have so qualified Section 5219 as to permit discrimination in taxation in favor of moneyed capital such as is here contended for. To so restrict the meaning and application of Section 5219 would defeat its purpose. It was intended to prevent the fostering of unequal competition with the business of national banks by the aid of discriminatory taxation in favor of capital invested by institutions or individuals engaged either in similar businesses or in particular operations or investments like those of national banks."

One of the leading cases on this subject is that of *Mercantile National Bank v. Mayor, etc.*, 121 U. S. 138. In that case this Court, in defining the term "moneyed capital", said:

> "Applying this rule of construction we are led, in the first place, to consider the meaning of the words, 'other moneyed capital' as used in the statute. Of course it in-

cludes shares in national banks; the use of the word 'other', requires that. If bank shares were not moneyed capital, the word 'other' in this connection would be without significance. But 'moneyed capital' does not mean all capital, the value of which is measured in terms of money. * * *

The business of banking, as defined by law and custom, consists in the issue of notes payable on demand, intended to circulate as money where the banks are banks of issue; in receiving deposits payable on demand; in discounting commercial paper; making loans of money on collateral security; buying and selling bills of exchange; negotiating loans, and dealing in negotiable securities issued by the government, state and national, and municipal and other corporations. These are the operations in which the capital invested in national banks is employed, and it is the nature of that employment which constitutes it in the eye of this statute 'moneyed capital'. Corporations and individuals carrying on these operations do come into competition with the business of national banks, and capital in the hands of individuals thus employed is what is intended to be described by the Act of Congress. That the words of the law must be so limited appears from another consideration: they do not embrace any moneyed capital in the sense just defined. * * *

The terms of the Act of Congress, therefore, include shares of stock or other interests owned by individuals in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money. The moneyed capital thus employed is invested for that purpose in securities by way of loan, discount, or otherwise, which are from time to time, according to the rules of the business reduced again to money and reinvested. It includes money in the hands of individuals employed in a similar way, invested loans, or in securities for the payment of money, either as an investment of a permanent character, or temporarily with a view to sale or repayment and reinvestment. In this way the moneyed capital in the hands of individuals is distinguished from what is known generally as personal property."

Counsel's theory as to just what capital is "competitive" is somewhat novel, but no extended argument is required to demonstrate its unsoundness in principle. For example, counsel contend that the automobile finance companies cannot properly be said to be "in competition" with banks. These companies are engaged in financing the business of automobile dealers by purchasing from the dealers notes and installment contracts secured by liens on automobiles sold by the dealers to their customers. In some instances the dealer was required to endorse such paper; in other instances the finance companies exacted a large discount and took the paper "without recourse". Petitioner during the four years here in controversy made loans to dealers in automobiles for the purpose of financing their business, and in many instances discounted, with the dealers' endorsement, notes given to the dealers by purchasers of automobiles. (See testimony of J. R. Capps, Record 457-460 inc. 466-467-471-476.) The record even shows that in some instances, petitioner was making loans to the identical dealers from whom the finance companies bought paper.

It is true of course that the *form* of the transaction is not identical in the loans made by Petitioner with the transactions of the finance companies; yet both transactions have the same ultimate purpose—to increase the working capital of the automobile dealer and thus enable him to expand his sales. The earnings or profit to petitioner on such a transaction comes from interest on the amounts loaned, while in the case of the finance companies, the earnings are the interest payments made by the purchaser of the automobile, plus the discount, granted by, or exacted from the dealer. In both cases the object of the business is to make a profit from the use of the business capital as money, and for that purpose the capital of the business is invested in securities, by way of loan, discount or otherwise, which are from time to time

reduced again to money and reinvested. See *Mercantile National Bank v. Mayor, etc., of New York*, 121 U. S. 138.

A reading of the testimony of the witness J. R. Capps will readily disclose that a substantial portion of petitioner's loan business consisted of loans and advances to automobile dealers. It is of course common knowledge that a very large percentage of all the automobiles sold in this country are sold on "time", or deferred payments. A dealer in automobiles may prefer to carry this paper himself, borrowing funds from his banker to enable him to do so, or he may, particularly if the volume of installment payments be large, prefer to turn the transactions over to a finance company who will relieve him of the necessity of looking after collections, and who will carry the risk of defaults in payments in return for a substantial discount. If the finance company is ably managed, builds up a large volume of business, and is able to offer relatively low discount rates it will obviously be favored by the automobile dealer, who will turn over to it all of his installment business, and the national bank may see him no more as a borrower of funds. Yet counsel say that the business of the finance companies is not "competitive" with that of petitioner! We believe Justice Stone had in mind just such situations as are here presented when he said in *First National Bank of Hartford v. Hartford, supra:*

> "With the great increase in investments by individuals, and the growth of concerns engaged in particular phases of banking as shown by the evidence, discrimination with respect to capital thus used could readily be carried to a point where the business of national banks would be seriously curtailed."

Manifestly, automobile finance companies such as the Iowa Guaranty Mortgage Corporation, the Bond and Mortgage Company of Iowa, the Des Moines Morris Plan Company, and the Continental Mortgage & Loan Company, were

carrying on a business of which if extended to its full limits might ultimately deprive all commercial banks of the loan business of dealers engaged in selling automobiles. Consequently, these corporations are in competition with the business of petitioner, and the moneyed capital represented by the shares of such corporations is directly within the prohibition contained in Section 5219 of the Revised Statutes.

On pages 95 and 96 of their brief, counsel for respondents advance substantially the same argument with respect to the so-called "cattle paper". The Record discloses that the United Cattle Loan & Livestock Corporation, the National Investment & Finance Company, the Union Mortgage & Cattle Loan Company, and the Federal Cattle Loan Society made loans to growers or feeders of livestock, secured by chattel mortgages on the animals. (See Record 318-323, 274-280, 743.) J. R. Capps, petitioner's cashier, testified that petitioner made direct loans to its customers to finance the purchase and feeding of cattle. (See Record 463-469-478).

The statement of counsel in respondents' brief, page 96, that "The banks have not testified to a single loan made on the security of cattle." is therefore directly contrary to the Record. It affirmatively appears without dispute that the loaning of funds to growers and feeders of livestock was a substantial portion of the business of national banks in Iowa. On page 630 of the Record is reproduced a tabulation taken from the report of the Comptroller of the Currency, which discloses that on November 15, 1920 national banks in the City of Des Moines had loaned to "farmers, agriculturists, and livestock raisers" more than $9,000,000, while national banks in the smaller communities of the state had more than $137,000,000 invested in similar loans.

The largest of these cattle loan companies was the United Cattle Loan & Livestock Corporation. This one institution in 1920 made loans on the security of cattle to the extent of $1,500,000, many of the loans being sold to banks in Iowa

and elsewhere. Both this company and the Federal Cattle Loan Society got in touch with their prospective borrowers through country banks in Iowa. The statements set forth on page 96 of respondents' brief are therefore incorrect and without support in the Record.

In the case of *Minnesota v. First National Bank of St. Paul*, 273 U. S. 561, this Court directly held that dealers in "cattle loan paper" were in competition with national banks and that capital invested in the cattle loan business was within the restriction found in Section 5219 of the Revised Statutes. We quote from the opinion of Justice Stone, the following:

> "Note brokers within the state in those years made loans to their customers upon paper which they sell to banks and other investors, amounting to as much as $100,000,000 annually. Much of this paper is sold outside of the state, but the amount sold to banks and to individuals within the state is substantial. One class of this paper known as 'cattle loan paper' exceeded $22,000,000 annually in the years in question, and of this $13,000,000 was sold to banks, corporations, firms, and individuals in Minnesota. The amount shown to have been sold to individuals approximated $1,000,000."

No further comment upon our part is needed. It is manifest, of course, from the quotation, that companies directly engaged in the "cattle loan business" are in competition with national banks.

The Security Loan & Investment Company, the Bond & Mortgage Company of Iowa, the Jesse F. Stevenson Company, and the Continental Securities Company were shown to be engaged in "financing public improvement contractors."

On pages 96-98 inclusive of their brief, counsel for the respondents urge that business of this type is not "competitive" with national banks. Petitioner was shown to have been engaged during the four years in question in making loans

to public improvement contractors to enable them to complete their improvements and "took in payment of the advances the bonds and certificates of the municipalities with which the contractors were dealing. In 1920 at least $170,000 of such loans were made." (Rec. 470.) It continued such business through 1922. (Rec. 479.)

As in the case of the automobile finance companies, there were slight differences in the methods adopted by the various companies engaged in financing these contractors. For that matter, there are differences in the financing methods of banks. One bank may require a larger measure of security than another or extend greater credit on the same security. Can it be that such facts alone render their business non-competitive in character? The Record shows without dispute that petitioner was engaged in the business of making loans to public improvement contractors in the identical field in which these finance companies operated. Hence, within the rules laid down by this Court, the business of the bank and the business of the finance companies were in competition, and the moneyed capital of the finance companies is within the restriction imposed by Section 5219.

Counsel also urge that the stock of mortgage loan companies, and real estate mortgages made for the purpose of investment by individual citizens do not constitute "moneyed capital" within the meaning of Section 5219 of the Revised Statutes. In support of ths position they cite the decision of the Iowa Supreme Court in *First National Bank v. Anderson*, 196 Iowa 587. We are at loss to understand just why counsel should cite this case as an authority, because the case was reversed by this Court. (See 269 U. S. 341.) In that case this Court, speaking by Justice Van Devanter, in referring to the allegations of the complaint, said:

> "No doubt they (the allegations of petition) are broad enough to include farm mortgages; but this does not weaken the allegation of completion, for while na-

tional banks were formerly prohibited from making loans on real estate (citing cases), the prohibition was partly withdrawn and much of that field was opened to such banks by the Acts of December 23, 1913, chap. 6, 38 Stat. at L. 273, and September 7, 1916, chap. 461, 39 Stat. at L. 754."

This Court again considered the subject in *First National Bank of Hartford v. Hartford*, 273 U. S. 548 at p. 560, where, speaking by Justice Stone, it said:

> "They are authorized, with certain limitations, to loan money on real estate mortgages. Act of December 23, 1913, *supra;* Act of September 7, 1916, *supra;* Act of February 25, 1927, sec. 24. Here plaintiff is shown to have investments in real estate mortgages and to be engaged in selling them. The sale of mortgages and 'other evidences of debt' acquired by way of loan or discount with a view to reinvestment is, we think, within the recognized limits of the incidental powers of national banks. *Compare First Nat. Bank v. Anderson*, 269 U. S. 348, 70 L. ed. 303, 46 Sup. Ct. Rep. 135; *Mercantile Nat. Bank v. New York*, 121 U. S. 156, 30 L. ed. 902, 7 Sup. Ct. Rep. 826. To that extent the business of acquiring and selling such mortgages and evidences of debt, carried on by numerous individuals, firms, and corporations in Wisconsin, comes into competition with this incidental business of national banks. That the exercise of this incidental power has become of great importance in the business of national banks appears from the Report of the Comptroller of the Currency for 1924, 44 *et seq.*, showing that approximately one-third of the investment of national banks consists of government, railroad, public service corporation and other bonds, and 'collateral trust and other corporation notes.'"

In this case it affirmatively appeared from the Reports of the Comptroller of the Currency offered in evidence that national banks in the City of Des Moines, and in Iowa, made loans on real estate mortgage security. Thus, on page 628 of the Record it appears that national banks in the City of Des Moines on June 30, 1919 held $110,000 secured by im-

proved real estate under authority of Section 24, Federal Reserve Act as amended, while national banks in Cedar Rapids, Dubuque, and Sioux City held such loans to the extent of $1,000,000. "Country banks" in the smaller communities in Iowa held such loans to the extent of $3,192,000 on that date. On June 30, 1920 (Record p. 635) national banks in Cedar Rapids, Iowa, held such loans to the extent of $1,307,000, national banks in Des Moines to the extent of $273,000, and the smaller banks held $3,793,000 in such loans. On June 30, 1921, (see Record p. 638), national banks in Des Moines held $68,000 in such loans secured by farm mortgages, while national banks in Cedar Rapids, Dubuque, and Sioux City, held more than $1,000,000 of such paper, and country banks held such loans to the extent of $3,264,000.

It affirmatively appeared that petitioner from time to time purchased and carried real estate loans without endorsement for insurance companies, banks, and other customers. The making of real estate mortgage loans secured by first liens on farms or city property is an important part of the business of banking as carried on in Iowa during the four years in controversy. Companies engaged in making such loans were, therefore clearly in competition with petitioner within the rules established by decisions of this Court.

Counsel for the respondents developed on cross examination that many of the companies engaged in the loan and investment business borrowed money from banks in the City of Des Moines, including petitioner. They seem to feel that this fact establishes that there was no competition between banks and the finance companies. Much of their argument with respect to "competition" is predicated on the theory that no institution with which banks had friendly dealings can be regarded as in competition.

This same argument was urged before the Circuit Court of Appeals for the 8th Circuit in the case of *Munn v. Des*

Moines National Bank, 18 Fed. (2d) 269. Circuit Judge Sanborn disposed of the contention in these words:

> "Counsel argue that the decrees below should be reversed, because the banks are estopped from maintaining their suit by the fact that they loaned money to some of their competitors in Polk County. But we discover nothing in that fact, if it existed, which in any way estops them from maintaining the suits before the court below and before us. The objection to the decrees on that account is in our opinion untenable."

The record discloses that petitioner loaned money to other banking institutions in the City of Des Moines and elsewhere. According to counsel for the respondents, this conclusively establishes that petitioner was not in competition with the banks to which loans were made. Such position, it seems to us, is little short of absurd. In *First National Bank of Hartford v. Hartford, supra*, it appeared that one of the principal companies, which was accorded a more favorable basis of taxation than complainant, was affiliated with, and its stock held by stockholders of the First Wisconsin National Bank of Milwaukee; yet the shares of this company were held to be moneyed capital. If shares of such a corporation are competitive with other national banks within the meaning of Section 5219, surely the mere fact that the companies engaged in the loan and investment business in the City of Des Moines found occasion to borrow funds from banks in Des Moines does not render the capital employed in such enterprises non-competitive.

In the instant case the evidence on behalf of petitioner showed that large amounts of money were loaned by individual investors in the same territory in which petitioner engaged in making loans. In several instances it was shown that officers and employees of various companies made loans to the companies. In *Minnesota v. First Nat. Bank of St. Paul*, 273 U. S. 561, Justice Stone, in discussing the character

of the moneyed capital shown by the record in that case, said: "Eleven business concerns to whom respondent made loans borrowed from their own officers and employees in one of the years in question about $1,500,000."

We have not included in our proof purchase money mortgages, accounts, or money on deposit in banks. We have confined the evidence to loans and investments by individuals in securities such as normally enter into the business of banking, together with evidence as to the business activities of corporations engaged in the loan and investment field in which petitioner was engaged. We believe that the record in the instant case discloses the existence of large and material amounts of moneyed capital, and that the direct character of the competition is more clearly disclosed than in the cases of *First National Bank of Hartford v. Hartford*, and *Minnesota v. First National Bank of St. Paul, supra.* The evidence, we submit, establishes with greater particularity the existence of moneyed capital in competition with the petitioner than in either of the cited cases, and for that matter, than in any of the cases determined by this Court within the past fifteen years, including the cases of *Merchants National Bank v. Richmond*, 256 U. S. 635; *Montana National Bank v. Yellowstone County*, 276 U. S. 499, and *Commercial National Bank of Miles City v. Custer County*, 275 U. S. 502, in which the decision of the Montana Supreme Court was reversed on the authority of *First Nat. Bank of Hartford v. Hartford.*

We submit, therefore, that the record abundantly discloses the existence of large and material amounts of moneyed capital within the meaning of Section 5219 of the Revised Statutes which were taxed at discriminatory rates. We believe that the majority of the Supreme Court of Iowa concede the existence of such moneyed capital; but even though the opinion be construed otherwise, under the record no other conclusion can be arrived at. The contention of coun-

sel for respondents is directly contrary to the prior decisions of this Court, and surely cannot be sustained.

IV.

By Proposition IV in respondents' brief (Page 119 to 121) it is contended that since the claimed unlawful and unconstitutional discrimination arose out of the administration of the tax laws of the State of Iowa, rather than because of the terms of such laws, petitioner may not have relief unless it can show that its actual competitors, and not its possible competitors, have been favored by lower rates of taxation. As supporting this contention, respondents rely upon the decision of the Iowa Supreme Court in the case of *First National Bank of Guthrie Center v. Anderson*, 196 Iowa 587, which case was by this Court reversed. See *First National Bank v. Anderson*, 269 U. S. 341.

But, aside from the fact that the case relied upon has been reversed by this Court, the contention is not only unsound, but is opposed to other decisions of this Court. In *First National Bank of Hartford v. Hartford*, 273 U. S. 548, at 559, it is said:

> "We do not conceive that in order to establish the fact of competition it is necessary to show that national banks and competing investors solicit the same customers for the same loans or investments. It is enough, as stated, if both engage in seeking and securing in the same locality capital investments of the class now under consideration which are substantial in amount".

Furthermore, as we have hereinbefore pointed out, the record abundantly shows that there was in each of the years involved in this case, in the same taxing district as petitioner, capital which was seeking and securing investments of the class under consideration in the same locality in a substantial amount, and, indeed, in some instances was seeking

and securing investments from identical parties to whom petitioner was loaning money.

V.

By Proposition V of respondents' brief (Pages 121 to 123) it is contended that all of the corporations, the assessment of whose capital stock was changed by the County Auditor of Polk County so as to subject it to a grossly favored rate of taxation when compared to the assessment of the shares of stock of petitioner, must be excluded from consideration because Section 5219 of the Revised Statutes forbids discrimination as to taxes on "moneyed capital in the hands of individual citizens", the argument being that corporations are not individual citizens, and that the statute forbids such discrimination only as to capital in the hands of individuals.

First, it will be noted that under the laws of Iowa (Section 1310, Code Supp. 1913; Appendix to Petitioner's Brief, Page 84) corporation shares of stocks are assessable and the tax imposed thereon collectible from the owner thereof, so that the holders of such corporation shares of stock are individual citizens within the meaning of Section 5219; and, next, this question has been definitely determined by decisions of this Court. In the case of *Mercantile National Bank v. Mayor*, 121 U. S. 138, it is said:

> "The terms of the Act of Congress, therefore, include shares of stock or other interests owned by individuals in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money."

To the same effect see *Evansville National Bank v. Britton, Treasurer*, 105 U. S. 322; *Merchants National Bank of Richmond v. Richmond*, 256 U. S. 635; *First National Bank of Hartford v. Hartford*, 273 U. S. 548.

VII.

By Proposition VII in respondents' brief (Pages 123 to 128) it is contended that different classes of people or property may be taxed at different rates if there is a reasonable classification under the Constitution of the State of Iowa, and that the administrative officers of the State and its subdivisions had the right to decide which particular class should be taxed in one manner and which in another, and that the taxation of the property complained of was not shown to be so similar to banks that to put it in another class for the purposes of taxation would be purely arbitrary classification.

There is no question of the power of the State of Iowa, through its legislature, to validly adopt reasonable classifications of property for the purposes of taxation under the State Constitution. The legislature of the State, by the enactment of Section 1310, Code Supp. 1913 (Appendix to Petitioner's Brief, Page 84), has exercised this power of classification and has provided:

> "All moneyed capital within the meaning of Section 5219 of the Revised Statutes of the United States shall be listed and assessed against the owner thereof at his place of business, and if a corporation, at its principal place of business, at the same rate as state, savings, national bank, and loan and trust company stock is taxed in the same taxing district and at the actual value of the moneyed capital so invested."

Thus, it will be seen that there is no room for this contention of respondents, because the legislature of the State of Iowa, acting within its constitutional powers, has expressly made the classification, and the record shows that regardless of this act of the legislature large and substantial amounts of such moneyed capital have been by the administrative officers of the State deliberately, intentionally, habitually, and

generally subjected to a grossly favorable and discriminatory rate of taxation. Certainly it cannot be that an administrative officer of the State has the power to classify property for taxation against the express and direct mandate of the acts of the legislature of the State, for it is the function only of the administrative officers to enforce and apply the laws of the State, and not to make them.

It is worthy of note in this connection that the Supreme Court of the State of Iowa in its decision paid no heed to this contention, but even the opinion of the majority of that Court is predicated upon the assumption that there had been a valid classification of property subject to taxation by the act of the legislature of the State of Iowa which was controlling.

VIII.

By Proposition VIII of respondents' brief (Pages 128 to 132, inclusive) it is contended that the act of the county auditor of Polk County, Iowa in habitually, wilfully, intentionally, systematically and generally taxing a large and substantial amount of moneyed capital at a grossly favorable and discriminatory rate in each of the years in question, was contrary to the laws of the State of Iowa, and as such constituted a violation of the laws of that State, and, that it rests solely with the Courts of Iowa to correct such violation of its laws, and that therefore no constitutional or federal question can arise therefrom. The case of *Barney v. New York*, 193 U. S. 430-8, is relied upon as supporting this contention.

Insofar as the case of *Barney v. New York, supra*, may seem to adopt the principle that an act invalid by a state law cannot be regarded as the act of the State, and that hence no federal question is involved, it must be regarded as overruled by *Raymond v. Chicago Union Traction Company*, 207 U. S. 20 and *Home Telephone and Telegraph Co.*

v. Los Angeles, 227 U. S. 278, where it is, among other things, said:

> "If there were room for such conclusion in view of what we have said, it would be our plain duty to qualify and restrict the *Barney* case insofar as it might be found to conflict with the rule here applied."

In respondents' argument under Proposition VIII it is said that petitioner has seized upon the phrase and fact that the officers of Polk County, State of Iowa, charged with the administration of the tax laws, did in each of said years "habitually, intentionally, wilfully, systematically and generally assess petitioner's competitors in the alleged improper manner complained of for the reason that this is a mystic shibboleth which the United States Courts have fixed upon in order to be able to say that the *administration* of the law as distinguished *from the law itself* is in contravention of the provisions of Section 5219 of the Statutes of the United States."

We think counsel have wholly misconceived the theory of petitioner's action in this respect. This Court, in repeated cases, has laid down the rule that the intentional and systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property. This is no catch word or phrase of the Federal Courts, as the brief of respondents asserts, but is a doctrine firmly established and settled by repeated decisions of this Court. See

Reagan v. Farmers Loan & Trust Co., 154 U. S. 362.
Sunday Lake Iron Company v. Wakefield, 247 U. S. 350.
Cummings v. Merchants Nat'l Bank of Toledo, 101 U. S. 153.
Raymond v. Chicago Union Traction Company, 207 U. S. 20.

Sioux City Bridge Co. v. Dakota County, 260 U. S. 441.

Taylor v. L. & N. R. R. Co., (C. C. A.), 88 Fed. 350.

It is further argued under Proposition VIII in respondents' brief that the county auditor testified that in making the changes and classification, he acted in good faith and in the belief that he was assessing the corporations as they should be assessed under the law, and that this would show that there was no habitual, wilful, intentional, systematic, or general attempt on his part to violate the law, or to create improper discrimination as against the plaintiff national bank.

It is not necessary that such intentional, habitual, systematic, and general acts were meant by such taxing officials to injure the petitioner, for, as said by Justice Taft in *Taylor v. L. & N. R. R. Co.*, (C. C. A.) 88 Fed. 350:

> "It is true that it must appear that the taxing officers whose acts of undervaluation created the unjust burden, must intentionally and habitually violate the law by assessing property at a less valuation than that which they know to be the true value, but *it is not true that they must be shown affirmatively to intend to injure complainant and his class of taxpayers in so doing.*" (Italics ours.)

We therefore submit that the contentions advanced in connection with Proposition VIII of respondents' brief are not sustainable.

IX and XI.

By Propositions IX and XI in respondents' brief (Pages 132 to 138) it is contended that petitioner is precluded from relief by reason of an adjudication, laches, and estoppel.

The same contentions were advanced in the Supreme Court of Iowa, and while the majority opinion does not predi-

cate its conclusions thereon in any degree, the minority fully answer and deny the same. (Record, pages 1387-1388).

The argument advanced is so confused that we are unable to determine just what facts are relied upon as establishing one of these defenses rather than the other, but we shall treat them in the order in which they are stated.

Concerning the plea of former adjudication, reference is made to certain appeals prosecuted from the Board of Review by the Iowa National Bank and Central State Bank. It appears that in the years 1919 to 1921, inclusive, the Iowa National Bank and Central State Bank prosecuted appeals from the Board of Review involving the claimed right of the banks to deduct the par value of Liberty bonds held by them from the amount of the assessment of their shares of stock. In the year 1919 the appeals from the Board of Review were tried, and judgments rendered in the District Court of Polk County, Iowa canceling the assessments upon the shares of the bank's stock, and a stipulation was entered into by counsel under the terms of which it was provided that the Iowa National Bank and the Central State Bank cases should abide the result of the appeal to the Supreme Court in the similar case known as *Des Moines National Bank v. Fairweather, et al.* The *Des Moines National Bank* case was appealed, and the judgment of the Polk County District Court was reversed. A writ of error was prosecuted to this Court to review the judgment of the Supreme Court of Iowa, and that judgment was affirmed. The Iowa National Bank and the Central State Bank commenced suits in equity in the United States District Court of Iowa to enjoin the collection of taxes upon their shares of stock for the four years in question in excess of the five mill rate. These suits in the Federal Court were based on substantially the same facts now relied upon by the banks.

Appeals from the Board of Review for the years 1920 and 1921 were never tried nor determined, but were volun-

tarily dismissed. Respondents now urge that these proceedings constitute a bar to the maintenance of the present suit. An examination of the proceedings in the case of *Des Moines National Bank v. Fairweather*, 263 U. S. 103, will readily disclose that the questions now urged were never brought before the courts in that case at all. The questions were not raised, they were not considered, and therefore that case constitutes no adjudication. It is a well settled rule that a judgment in a prior action between the same parties operates as an adjudication or an estoppel only as to those matters in issue, upon the determination of which a finding was rendered.

In *Cromwell v. County of Sac*, 94 U. S. 351, 24 Law ed. 195, it appeared that bonds of Sac County, Iowa, had been delivered to a contractor in payment for public improvements. One of these bonds ultimately came into the hands of one Smith. Smith sued on one of the interest coupons but failed to show that he was a bona fide purchaser for value, and as the bonds were fraudulent, the Iowa court ruled that Smith was not entitled to recover. Cromwell became the assignee of some of the bonds held by Smith, and brought action upon them, and it was contended that the action by Smith constituted an adjudication. This Court in passing upon the question said:

> "In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other

admissible matter which might have been offered for that purpose. Thus, for example; a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defenses were not presented in the action,—and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment cannot again be brought into litigation between the parties in proceedings at law, upon any ground whatever.

But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action; not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

See also:

United Shoe Mach. Co. v. United States, 258 U. S. 451, 66 Law ed. 708.

Radford v. Myers, 231 U. S. 725, 58 Law ed. 454.

Alt v. Young, 181 Iowa 1260.

Nesbit v. Independent District of Riverside, 144 U. S. 610; 36 Law ed. 562.

The identical defense now urged was urged in the case of *Munn v. Des Moines National Bank*, 18 Fed. (2) 269 but the Circuit Court of Appeals found it untenable. In the opinion by Circuit Justice Sanborn, it is said:

"Another contention of counsel for the treasurer is that these banks did select and pursue the remedy offered to them by section 1373 to establish the causes of action pleaded in this suit and that in those proceedings those causes of action were finally adjudged against them. In the consideration of this claim we take the case of the Des Moines National Bank and the year 1919 because they are typical of the facts in all the cases in hand. * * *

Nor did this petition contain any prayer for any relief on account of the taxation of this competitive moneyed capital or the use of it. The board of review allowed a deduction of $62,000 from the total amount of the capital, surplus and undivided earnings of the bank assessed on account of the bank's obligation based on its indebtedness to the stockholders of the German Savings Bank, and granted no other relief. Thereupon the bank filed a petition in the district court of Polk County, Iowa, against the members of the board of review in which it repeated the averments made in its petition to the board with the exception of the averments about the $62,000. This second petition, however, contained no averment of the amount of moneyed capital of any party or person used or usable in 1919 in competition with the moneyed capital of the bank, or of the aggregate thereof, and its prayer was that the assessment of the bank's property be lowered to the extent of the par value of the securities issued by the United States owned by it on January 1, 1919, and by the amounts of those owned by it for sixty days prior to December 1, 1918, and for such further relief as to the court should seem meet. It contained no prayer for any relief on account of the discriminatory taxation of competitive moneyed capital and no averment of the amount or value of such capital or any part of it. The defendants demurred to the petition, the district court sustained the demurrer, the bank appealed to the Supreme Court of the State, that Court reversed the judgment of

the district court, and the plaintiffs appealed to the Supreme Court of the United States and that court affirmed the judgment of the Supreme Court of Iowa. *Des Moines National Bank v. Fairweather*, 191 Iowa, 1240, 1253, 1254, 181 N. W. 459, 184 N. W. 313; *Des Moines National Bank v. Fairweather*, 263 U. S. 103, 105, 114, 116, 44 S. Ct. 23, 68 L. Ed. 191. But those courts did not consider, discuss, or decide the question whether the petition stated any cause of action on account of discriminatory taxation between the shares of the bank and the moneyed capital in the hands of individual taxpayers used in competition therewith. * * *

The claim of counsel is that by the proceedings of this bank in its former case, the cause of action pleaded and tried in this suit was pleaded and adjudged against the bank. The test of the identity of causes of action is the identity of the facts essential to maintain them. *Harrison v. Remington Paper Co.*, (C. C. A.) 140 F. 385, 400, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314; *Union Central Life Ins. Co. v. Drake*, (C. C. A.) 214 F. 536, 545; *Pierce v. Nat'l Bank of Commerce*, (C. C. A.) 268 F. 487, 496. Because in that former proceeding instituted before the board of review and continued in the state court the bank did not plead the amount of other moneyed capital in competition with the business of the bank held by any of the parties it named in its pleadings, or the aggregate amount they so held, because in those proceedings the bank did not pray for any relief on account of discrimination against it by the taxation of competitive moneyed capital, because it did not prove any such discrimination, and because, if any evidence of discrimination in taxation could have been lawfully received under those former pleadings, and we are of the opinion that none could have been over proper objection, radically different evidence and a very large amount of it was indispensable to sustain the cause of action in this case, our minds have been forced to the conclusion that this bank was not estopped by its former proceedings from commencing and prosecuting to a favorable decree the cause of action pleaded by it in this suit."

This was a determination by the Circuit Court of Appeals of the Eighth Circuit, under the very facts disclosed

here, that the proceedings, which counsel contend constitute an adjudication of this controversy, would not bar a suit in equity to enjoin the collection of the taxes. Further citation of authority on this proposition seems unnecessary.

On Page 135 of respondents' brief it is said, with regard to the dismissal of the cases seeking injunctions against the collection of the taxes:

> "If this does not constitute an adjudication, it certainly would constitute estoppel and laches on the part of these petitioners."

No authority is cited for this novel proposition. It is a fundamental rule recognized in Iowa that the voluntary dismissal of an action by complainant does not constitute an adjudication of any of the matters at issue in the pleadings. See

Newberry v. Newberry, 114 Iowa, 704.
Brown v. Holden, 120 Iowa, 191.
Atkins v. Anderson, 63 Iowa, 739.

It is further contended by respondents that the petitioner was guilty of laches which will bar its claim. The only cases cited in support of this contention are the cases of *Slimmer v. Chickasaw County*, 140 Iowa, 448, and *Farmers Insurance Co. v. Linn County*, 202 Iowa 444. The facts in the case of *Slimmer v. Chickasaw County* were that a property owner listed his property for taxation in one county. Subsequently a tax ferret discovered that he had been a resident of another county, and a compromise settlement of his claim of liability to taxation in the second county was made. Subsequently the plaintiff sued to recover the money paid in carrying out this settlement. It was held that he could not recover the money so paid in an action at law against the county.

It is not contended here that the county officers changed their position in reliance upon any action or lack of action on the part of petitioner. It is not denied that the county officers were at all times advised that the banks were claiming that the taxes were illegal, and that the officers were without authority to exact them. Consequently there is no basis for the equitable plea of laches, nor does the claim of estoppel find support in the record. It must be borne in mind that the litigation involving the right to the deduction of liberty bonds and other federal securities was not finally determined until November, 1923. Claims for refund were filed in approximately one year and nine months after the payment of the taxes. It seems to us quite apparent there is no basis in this record for a plea of laches or estoppel, and we do not believe that counsel for the respondents seriously contend to the contrary.

Where taxes are void or illegal, a taxpayer is not required to resort to all remedies which might possibly be available to him before payment of the taxes. He has the legal right to rely upon Section 7235 of the Code and to pay the taxes and to bring proper proceedings to procure a refund thereof.

See *Dickey v. County of Polk*, 58 Iowa, 287, where the Supreme Court of Iowa said:

> "Before payment of the illegal taxes the law secures other remedies to the taxpayer. He may appeal from the action of the court of equalization, as in *Getchell v. Supervisors, supra,* and *Ingersoll v. Des Moines,* 46 Iowa 553, or he may invoke the aid of a writ of certiorari, as in *Royce v. Jenney, et al.,* 50 Iowa 676. But he could gain no relief by these remedies after payment of the taxes. They are intended to protect him from the enforcement of the taxes by collection. When the taxes have been paid his only remedy is by action to recover them back. His failure to pursue remedies to arrest the collection of the taxes, does not waive or forfeit his right to bring such an action. The obvious

purpose of Code, section 870, is to give a remedy by action to recover for taxes paid which the taxpayer could not have been compelled to pay."

X.

By Proposition X in respondents' brief (Pages 138 to 141) it is contended that the taxes involved were not void or illegal within the meaning of Section 1417, Code of Iowa, 1897 (Appendix to petitioner's brief, Page 90), and that the payments were voluntary, which precludes relief to petitioner.

Again we may point out that the majority opinion of the Supreme Court of Iowa is not based upon this contention in any degree, although it was presented, and also that the minority opinion (Record, Page 1392) completely answers and denies this contention.

Furthermore, we have already seen in the consideration of the facts disclosed by this record that the taxes are void, not merely irregular, nor does the record disclose that counsel's contention with respect to the voluntary character of the payments is true in point of fact. At the time of the payments by the petitioner, actions in equity were pending against the county treasurer involving the same questions upon which this suit is based. The tax receipts were all endorsed "Paid under Protest". What more was required on the part of the petitioner to enable it to invoke the rights given by said Section 1417 of the Iowa Code? Under the decisions of the Supreme Court of Iowa no particular protest is necessary in order to preserve the rights of a taxpayer to a refund under this Section. In fact, that Court has frequently held that where the payment of taxes was entirely voluntary, such fact presented no obstacle to a refund under the law. Such was the holding in *Lawman v. Des Moines County*, 29 Iowa 310; *Richards v. Wapello County*, 48 Iowa 507; *Dickey v. County of Polk*, 58 Iowa

287; *Commercial National Bank v. Board of Supervisors*, 168 Iowa 501. In the case last cited the Court said:

> "The taxes were voluntarily paid as contended, but this furnishes no objection to refunding under this statute."

Nor is it true, as contended by respondents, that payment of the taxes without a specific protest waives the taxpayer's right to demand a refund in all cases except where the whole tax is void *in toto*.

The case of *Hawkeye Company v. Marion*, 110 Iowa 468, cited by counsel, is inapplicable. That case involved a special assessment for the construction of a sidewalk, and the holding was that a property owner who voluntarily pays the amount of his assessment cannot sue the town for its recovery. The refund statute is inapplicable to special assessments.

Furthermore, as pointed out in petitioner's previous brief, the payment of the taxes was under compulsion and to avoid the imposition of additional large penalties, and under such circumstances it has been clearly established by the decisions of this Court that relief may be had.

See

Carpenter v. Shaw, 280 U. S. 363.
Ward v. Love County, 253 U. S. 17.

XII.

By Proposition XII in respondents' brief (Pages 141 to 148) it is contended that the petitioner has not come into equity with clean hands: first, because some of the banks sold real estate mortgages and did not require the purchasers to record assignments thereof; and, second, because petitioner and other banks, either directly or indirectly, through an organization known as the Des Moines Clear-

ing House Association, decreased the amount of interest which such banks paid upon savings deposits, and installed a charge for carrying small accounts, which actions, it is claimed, were contrary to public policy.

Again we may point out that the majority opinion of the Iowa Supreme Court paid no heed to this contention, while the minority, in speaking of this question, said (Record, 1393):

> "The appellees argue that the appellants have not come into court 'with clean hands'. We find nothing in the record of any conduct on their part in connection with the matter in litigation which is unconscionable or such as to bar them from their legal and equitable rights."

There is no room for the application of the equitable maxim resorted to in connection with this proposition for the reasons: First, because there is no proof of any inequitable or unconscionable conduct on the part of any of the banks or their officers; second, because there is no legal duty on the part of the seller of a note or mortgage to require the purchaser to record his assignment; third, because the legal duty rests upon the owner of any such mortgage, whether purchased from a bank or not, and whether an assignment thereof is recorded or not, to furnish the assessor upon demand a full and complete itemized sworn statement showing the amount of moneyed capital so used (Section 1310, Iowa Code; Appendix, Petitioner's Brief, Page 84); and, fourth, because the maxim refers only to the identical transaction under inquiry by the Court, and will not be extended to include the general moral status or conduct of a plaintiff seeking equitable relief.

It is not contended that any officer of petitioner, or of other banks in Des Moines, in the years in question advised purchasers not to record their assignments of mortgages, nor

is there any evidence that a penny in tax money was lost to the State or its political subdivisions because of the failure of the officers of the banks to require that assignments of mortgages be placed of record.

The fact that petitioner was a member of the local clearing house, and the further fact that the clearing house banks some years subsequent to the time involved in this case decreased the rate of interest which was paid upon savings deposits to their depositors, or installed a charge for carrying small accounts, are urged as a basis for the holding that petitioner was a party to an illegal combination, monopoly, or trust, contrary to the public policy of the State; and in Brief Point XII a citation to Corpus Juris is relied upon as sustaining this contention. Certainly it requires no argument to demonstrate the fallacy of this contention. Nothing involved in this suit is influenced in the slightest degree by the rate of interest paid to savings depositors, nor the charge for the expense incident to carrying small accounts, and certainly it is beyond any reasonable conception that such acts would constitute a combination such as prohibited by the laws of Iowa with respect to monopolies and trusts.

XIII.

By Proposition XIII of respondents' brief (Pages 148 to 154) it is contended that the petitioner is not a proper party, and that the suit should have been brought by the individual stockholders of petitioner.

Again, it will be noted that the decision of the majority of the Iowa Supreme Court is not based upon this contention, nor was any consideration given thereto by the majority. On the other hand, the question was considered, answered, and denied by the minority in so convincing a way that we take the liberty of calling to the Court's attention

the following quotation from its opinion: (Record, 1388 to 1392)

> "Another contention of the appellees is, that the banks are not the proper parties plaintiff, or that there is a defect of parties, because the share holders are not joined. This contention of the appellees is also devoid of merit. See Section 1325 of the Code of 1897; *Kennedy v. Citizens National Bank*, 128 Iowa 561; *Fourth National Bank v. City of Boston*, 300 Fed. 29; *First National Bank v. Achenbach*, (Okl.) 237 Pac. 574; *McFarland v. Central National Bank*, 26 Fed. (2d) 890; *Hannan v. First National Bank of Council Bluffs*, 269 Fed. 527; *First National Bank of Watertown v. Eddy*, (S. D.) 198 N. W. 554; *National Bank of Commerce v. City of New Bedford*, (Mass.) 29 N. E. 534; *State National Bank v. City of Memphis*, (Tenn.) 94 S. W. 606; *Home Savings Bank v. Morris*, 141 Iowa 560; *Fort Madison Security Company v. Maxwell*, 202 Iowa, 1346; *Cummings v. Merchants Natl. Bank*, (U. S.) 25 L. Ed. 903.
>
> The evidence shows, without dispute, that the banks actually paid the taxes out of their own funds and no recoupment has been made from the shareholders—no dividend has been declared out of which the taxes were paid.
>
> Section 1325 of the Code of 1897, provides, in substance, that the bank shall be liable for the payment of the taxes assessed to the stockholders of such corporation.
>
> In *Kennedy v. Citizens National Bank*, 128 Iowa 561, the plaintiff, a stockholder, brought action against the bank to recover an alleged dividend due the stockholder. The bank had paid the taxes from its own funds, but made no allowance therefor in the payment of dividends. The plaintiff brought suit on the theory that the payment of the tax constituted a declaration of a dividend. This court in the determination of the case, made the following pronouncement:
>
> > 'The defendant bank, as was its duty, paid the taxes levied against the shares of stock from 1892 to 1898, inclusive, but neglected to retain the respective amounts from the dividends subsequently declared, or to enforce the lien thereof against the

stock, as permitted by statute. See section 819, Code 1873 (section 1325, Code 1897). * * * The taxes were paid by the bank, as agent of the stockholders, in pursuance of statutes so requiring; and under the Code of 1873 it had the right 'to retain so much of any dividend belonging to any shareholder as shall be necessary to pay any taxes levied upon his shares'; and under the Code 'the corporation may recover from each stockholder his proportion of the taxes so paid, and shall have a lien on his stock and unpaid dividends therefor. If unpaid dividends are not sufficient to pay such tax, the corporation may enforce such lien on the stock by public sale of the same', etc. These claims for the repayment of the taxes, then, were assets of the bank. It had the right to collect them the same as any other indebtedness owing it, and from its omission or neglect to do so no liability in favor of any individual stockholder arose. As said, the debt belonged to the bank, and not to him, and under all the authorities he may not maintain an action thereon for his own benefit.'

In *McFarland, County Treasurer v. Central National Bank of Topeka*, 26 Fed. (2d) 890, a demurrer to the petition on the ground that the bank could not maintain the action because the stockholders were necessary parties and the only proper parties plaintiff was overruled, the court declaring:

'The pleadings of the bank clearly alleged these facts which have been stated and others. The defendants demurred to these pleadings, the court below overruled their demurrer, and their counsel contends that there was error in this ruling, because the bank was not the real party in interest in this action and its shareholders were.

But these defendants in this case are in no position to invoke the protection of the statute, which requires actions to be brought by the real party in interest, because the prosecution by the bank of this action and its recovery from the defendants of this $12,477.26, which the bank paid to them, will protect them from any future suits or claims to that fund by any other party. The purpose of the stat-

ute is not to allow defendants to demand the adjudication of equities which exist wholly between the plaintiff and third persons, and that purpose is fully attained, so far as the defendants are not shut out from their proper defenses and counterclaims, and will be fully protected by the judgment, whether for or against the plaintiff, in the event of any other claim on the same cause. * * * The defendants cannot be heard to maintain this dog in the manger defense.

Nor, if it were heard, could the defendants sustain it. Section 79-1101 of the Revised Statutes of Kansas provided that the president, cashier, or other managing officer of this bank should furnish the assessing officer during the month of March in each year a list of all its shareholders and of the number of shares owned by each shareholder, and a statement under oath correctly showing the amounts of capital stock, surplus and undivided profits of the bank as of March 1st of each year, and that it shall pay the tax assessed upon the shares of stock and shall have a lien thereon until the same is satisfied: Provided, that if for any reason the taxes levied upon the shares of stock shall not be paid by the institution, the property of the individual shareholders shall be held liable therefor. * * *

To prevent the seizure and sale of the property of the shareholders in payment of these illegal taxes until after a judicial decision of the question of their legality could be procured, the bank paid this $12,477.26 to the defendants. The shareholders did not pay it; there is no evidence that they ever reimbursed the bank for its payment. The defendants received this money and still have it. They have no legal or equitable right to it, or interest in it, and in law and equity they ought to pay it back to the bank, and we are of the opinion that the bank is the real party in interest in this action, and can maintain its action for it, and recover it from the defendants. *Cummings v. National Bank*, 101 U. S. 153, 156, 25 L. Ed. 903; *Hannan v. First National Bank*, (C. C. A.) 269 F. 527, 530; *First Nat. Bank v. City of Hartford*, 273 U. S. 548, 47 S. Ct. 462, 71

L. Ed. 767; *Ranchmen's Trust Co. v. Duncan*, 114 Kan. 308, 310, 219 P. 523.'

In *Fourth National Bank v. City of Boston*, 300 Fed. 29, we find the following pronouncement:

'It seems to be conceded that an action may properly be brought by the bank as the statutory tax-paying representative of the shareholders'. (Citing numerous cases.)

In *Hannan v. First National Bank of Council Bluffs*, 269 Fed. 527, it was held that since the bank is made liable for the payment of the taxes assessed to its stockholders, a pecuniary liability is imposed on the bank for the payment of the total amount of the tax imposed on all its stockholders, and that it (the bank) is the real party in interest in a suit brought to enjoin the collection of the taxes.

In *Cummings v. Merchants National Bank*, (U. S.) 25 L. Ed. 903, it was contended that a National Bank could not, as plaintiff, bring an action in equity to enjoin the collection of taxes upon its shares of stock levied in violation of Section 5219 of the Revised Statutes. The court in disposing of this contention said:

'In paying the money it is acting in a fiduciary capacity as the agent of the stockholders; an agency created by the Statute of the State. If it pays an unlawful tax assessed against its stockholders, they may resist the right of the bank to collect it from them. The bank, as a corporation is not liable for the tax, and occupies the position of stakeholder, on whom the cost and trouble of the litigation should not fall. If it pays, it may be subjected to a separate suit by each shareholder. If it refuses, it must either withhold dividends and subject itself to litigation by doing so, or refuse to obey the laws, and subject itself to suit by the State. It holds a trust relation which authorizes a court of equity to see that it is protected in the exercise of the duties appertaining to it.'

Other quotations of similar nature could be made from the foregoing authorities, but we deem it unnecessary. As hereinbefore stated, the banks paid the taxes out of their funds, and no dividends have been declared out of which these taxes were paid. It is quite clear that the claims for a refund are assets belonging to the banks, and that they are the proper plaintiffs in these causes of action."

By Proposition XIV in respondents' brief (Pages 155 to 157) it is contended that if the petitioner had been assessed at the rate of five mills on the dollar on all its moneys and credits, the tax would have been much more than the amount that it was compelled to pay.

In order to sustain this position it is contended that the amount of the moneys and credits of petitioner must be computed without the deduction of debts, although under Section 1311, Code of Iowa, in force at the times involved in this case, it was provided:

"In making up the amount of moneys or credits which any person is required to list, or to have listed or assessed, including the actual value of any building and loan shares, he will be entitled to deduct from the actual value thereof the gross amount of all debts in good faith owing by him."

In order to justify this contention respondents present the novel proposition that "the amounts due depositors by the banks is not a debt. It has been so held by the courts. The banks were the actual owners of all the money and credits in their possession. They became the owner of all the money deposited with them. Of course, they must pay it back under certain circumstances, but as long as they held it they were the owner, and the courts have so held".

This is new to us, as we believe it will be to this Court. In Iowa, as elsewhere, the laws place extra precautions and impose unusual duties in regard to the repayment of de-

posits by banks. Double liability is imposed upon stockholders for this purpose. And how anyone can say that a deposit in a bank is not a debt of that bank is beyond our comprehension.

By Proposition XV in respondents' brief (Pages 157 to 158) it is contended that this action is barred by the statute of limitations.

Again, we desire to call to the court's attention the fact that the majority opinion of the Supreme Court of Iowa is not based upon this contention, although it was presented; and in the minority opinion the question is considered, answered and denied. (Record, 1386-1387.) Here it is said:

> "The appellees assert that the appellants' causes of action are barred by the statute of limitations. This contention is devoid of merit. The actions were brought within five years from the date of payment of the taxes. The period of the statute of limitations is five years and the action accrues at the time of the payment of the tax. See Par. 4, Section 11007 of the Code; *Callanan v. County of Madison*, 45 Iowa 561; *Beecher v. County of Clay*, 52 Iowa 140; *Murphy v. Board of Supervisors*, 205 Iowa 256."

XVI.

By Proposition XVI (Pages 158-160) in respondents' brief it is contended that there was no evidence of competitive moneyed capital for the year 1919. No authorities are cited to sustain this contention, and no heed was given to the contention by the Iowa Supreme Court. It appears, however, from respondents' argument that the assessments upon which the taxes were based were as of January 1, 1919, and the assessments of the competing capital shown in the Record for that year were also of the same date. The taxes based upon the assessment for the year 1919 were not payable until the year 1920, and the Record is replete with evi-

dence showing the competitive character of other moneyed capital accorded the discriminatory rate of taxation. It would only be the indulgence in repetition to specifically call the Court's attention thereto.

XVII AND XVIII.

By Proposition XVII and XVIII in respondents' brief (Pages 160 to 162) it is contended that the judgment of the Supreme Court of Iowa was not a final judgment, and therefore petitioner is not entitled to a writ in this Court.

This contention is based upon the following situation: The opinion of the Iowa Supreme Court was filed on September 26, 1930. On October 25, 1930 respondents here, appellees in the Iowa Supreme Court, served on counsel for petitioner a notice of intention to petition for rehearing, and the notice was filed in the office of the clerk on the same date. On October 27, 1930 petitioner served and filed a similar notice of intention to petition for rehearing. Neither party filed any petition for rehearing within the time required by the rules of the Iowa Supreme Court, and the judgment thereupon became final on November 25, 1930, sixty days having elapsed without the filing of a petition for rehearing by either party. (See R. 1408-1411, incl.)

The statutes of the State of Iowa relating to appeals and rehearings in the Supreme Court of that State having to do with this contention are as follows:

> "Section 12880. If a petition for rehearing is filed, it shall suspend the decision, if the court or one of the judges upon its presentation so order, until after the final decision on the rehearing.
>
> Section 12881. Written notice of intention to petition for a rehearing shall be served on the opposite party or his attorney and the clerk of the supreme court

within thirty days after the filing of the opinion, or within such time as the court may by rule prescribe.

Section 12882. Such petition shall be printed, and, with proof of service thereof on the opposite party or his attorney, shall be filed with said clerk within sixty days after the opinion is filed."

"A notice of the petition for rehearing has no effect to suspend the decision, and a petition filed has no such effect, 'unless the court or one of the judges upon its presentation so order' ".

State v. Cahill, 131 Iowa 286, at 288.

The effect of the filing of the notice of intention to petition for rehearing was merely to extend the time within which such petition might be filed.

No such petition was filed in this case, and the judgment of the Iowa Supreme Court became a finality before the writ was applied for in this Court. The identical question has been considered and disposed of by this Court. In *Southern Railway Company v. Clift*, 260 U. S. 316, at 318, this Court says:

"A motion is made by defendant in error to dismiss the writ of error, this court, it is contended, being without jurisdiction. The grounds of the motion are specified as follows: (1) The judgment, at the time the transcript was filed, had not become final. (2) It did not decide any Federal question.

To sustain the first ground, it is said that, under the law of the state, within sixty days after the termination of the case by the supreme court, 'either party may file a petition for a "rehearing".' From this it is deducted and contended that the successful as well as the unsuccessful party in the action may file a petition for rehearing, and that, until the expiration of the time for the exercise of the right, the judgment does not become final. The contention is curious. Legal procedure is a facility of rights; and rights achieved, its purpose is

done. A successful litigant does not need the delay and provision of a rehearing. He has more efficient and enduring relief. His affliction may be solaced by not enforcing the victory which is the cause of it. The contention of defendant in error is so obviously untenable that further comment upon it would be the veriest supererogation."

Surely, there is no merit to the contention of respondents.

We, therefore, confidently assert that the various propositions urged by respondents are without substance, and that the decision of the Supreme Court of Iowa should be reversed, with directions to enter such order and decree as may secure to petitioner the Federal rights to which it is entitled, and which it has claimed in this proceeding.

Respectfully submitted,

J. G. GAMBLE,

A. B. HOWLAND,

Counsel for Petitioner.

FILE COPY

MAY 16
CHARLES ELMO

IN THE

Supreme Court of The United States

OCTOBER TERM, 1930.

IOWA-DES MOINES NATIONAL BANK,
Petitioner,

vs.

J. M. STEWART, et al.,
Respondents.

No. 15

MOTION FOR SUBSTITUTION OF PARTIES RESPONDENT.

J. G. GAMBLE,
A. B. HOWLAND,
Des Moines, Iowa,
Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1930.

IOWA-DES MOINES NATIONAL BANK,
Petitioner,

vs.

J. M. STEWART, et al.,
Respondents.

MOTION FOR SUBSTITUTION OF PARTIES RESPONDENT.

The petitioner respectfully states and shows the Court:

That this is an action against the respondents as members of the Board of Supervisors of Polk County, Iowa, seeking a refund of taxes erroneously and illegally exacted of petitioner in violation of the Constitution and laws of the United States. That on March 16th, 1931 this Court granted a writ of certiorari to review the decision and judgment of the Supreme Court of Iowa denying to petitioner the relief sought.

That at all times while the cause was pending before the Iowa Supreme Court, the Board of Supervisors of Polk County, Iowa, consisted of J. M. Stewart, Chairman, E. R. Bennett, C. F. Keeling, C. W. Keller and Frank E. Thornton; that the term of office of the respondent Keeling expired on January 2, 1931, and on said date he was succeeded by Ben B. Dewey; that all of the other respondents continued in office or were re-elected to succeed themselves.

That the members of the County Board of Supervisors, under the laws of Iowa, choose a chairman from among their own number; that on or about the second day of January, 1931, the respondent, E. R. Bennett was chosen as chairman of the Board of Supervisors of Polk County, Iowa, and succeeded the respondent J. M. Stewart in that capacity.

This motion for substitution is made under the terms of Section 11 of the Act of February 13, 1925, and Rule 19 paragraph 4 of the Rules of this Court.

The petitioner moves the Court for an order substituting Ben B. Dewey as respondent as the successor in office of the respondent, C. F. Keeling, and substituting E. R. Bennett as chairman of the Board of Supervisors of Polk County, Iowa, in place of the respondent Stewart.

J. G. GAMBLE,
A. B. HOWLAND,
Counsel for Petitioner.

FILE COPY

MAR 7 1931
CHARLES ELMORE CROP

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 15

IOWA-DES MOINES NATIONAL BANK, *Petitioner,*

vs.

J. M. STEWART, et al., *Respondents.*

RESISTANCE TO PETITION FOR A WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

ESKIL C. CARLSON,
MAXWELL A. O'BRIEN,
Counsel for Respondents.

INDEX.

Page.

General Statement as to matters involved 1
Reasons why Writ should not issue 2

TABLE OF CASES CITED.

Barney vs. City of New York, 193 U. S. 430-8 5
Davenport Nat. Bank vs. Board, 64 Iowa 140 5
Eustis vs. Bolles, 150 U. S. 361-70 7
Ft. Madison Co. vs. Maxwell, 202 Iowa 1346 5
Griswold Co. vs. Calhoun Co., 198 Iowa, 1240 7
Jenkins vs. Neff, 46 U. S. L. Ed. 1140 5
Matthews vs. Howe, 269 U. S. 262 2
Mo. Pac. Ry. vs. Fitzgerald, 160 U. S. 556 7
Ohio River Co. vs. Fisher, 115 Fed. 929 4
State vs. Hall, 54 Southern 560 6

TABLE OF STATUTES CITED.

Code Sections—1927 Code of Iowa:

Section 12881 ..... 3, 3
Section 12882 ..... 3, 4
Section 12880 ..... 3, 4
Section 12875 5
Section 12876 5

Iowa Supreme Court Rule:

Rule 37 4

Appendix:

Certificate of Supreme Court of Iowa 8

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 711

IOWA-DES MOINES NATIONAL BANK, *Petitioner,*

vs.

J. M. STEWART, Chairman of the Board of Supervisors of Polk County, et al., *Respondents.*

RESISTANCE TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Supreme Court of the United States:

The respondents, J. M. Stewart as Chairman of the Board of Supervisors, et al., respectfully makes this resistance to the petition for writ of certiorari filed herein:

GENERAL STATEMENT AS TO MATTERS INVOLVED.

These respondents, while not admitting the entire correctness of either the transcript filed herein, or of the statement of facts as set out in the Petition for the writ of certiorari, or in petitioner's brief in support thereof, and expressly reserving the right to deny and correct same at the proper time, does show to this Honorable Court that upon the tran-

script and petition as filed this Honorable Court should not grant, and petitioner has no right to demand that a writ of certiorari issue herein for the following reasons:

REASONS WHY WRIT SHOULD NOT ISSUE.

I.

The petitioner if, as claimed, a federal question was involved, might have originally brought its suit in the Federal Court. Instead it voluntarily submitted itself to the jurisdiction of the State Court, and pursued its remedy to the highest court of the state, and then when the decision was against it in that court, and after all of the proceedings as set out on pages 1956 to 1959 of the transcript herein, it filed in said Supreme Court of Iowa its notice of intention to petition for a rehearing as provided by the laws of Iowa and rules of said court upon the decision of said court against it as originally rendered, thus again submitting itself to and invoking the jurisdiction of said court. That without waiting for the ruling of said Supreme Court upon said notice of petition for rehearing, this petitioner abandoned said petition, thus preventing any final decision on said cause, and placing the matter in such a position that neither the Supreme Court of Iowa, nor the Supreme Court of the United States, has any jurisdiction in the matter, except to carry out the decree as originally rendered by the District Court and affirmed by the Supreme Court of Iowa.

See statement and certificate of the Clerk of the Supreme Court of Iowa as set out in the appendix hereto.

Petitioner has therefore waived the right and is estopped to now sue out a writ of certiorari from this Honorable Court.

The following case supports this proposition:

Matthews vs. Howe, 269 U. S. 262.

The following are the statutes of the State of Iowa on this subject as found in the Code of 1927:

Code Sec. 12881. Written notice of intention to petition for a rehearing shall be served on the opposite party, or his attorney and the clerk of the supreme court within thirty days after the filing of the opinion, or within such time as the court may by rule prescribe.

Code Sec. 12882. Such petition shall be printed, and, with proof of service thereof on the opposite party or his attorney, shall be filed with said clerk within sixty days after the opinion is filed.

Code Sec. 12880. If a petition for rehearing is filed, it shall suspend the decision, if the court or one of the judges upon its presentation so order, until after the final decision on the rehearing.

II.

The petitioner, after it had procured the stay order from the Supreme Court of Iowa, as set out on pages 1958 and 1959 of the transcript, on the ground that it desired to carry said cause to the United States Supreme Court, filed in said Supreme Court of Iowa, in the manner provided by law, its notice of intention to file a petition for rehearing in said cause, thus invoking the power of that court to change the opinion and decision theretofore rendered against petitioner and thereby abandoning petitioner's right, if any it had, to sue out a writ of error from this Honorable Court.

The following are the statutes of the State of Iowa on this subject as found in the Code of 1927:

Code Sec. 12881. Written notice of intention to petition for a rehearing shall be served on the opposite party or his attorney and the clerk of the supreme court within thirty days after the filing of the opinion, or within such time as the court may by rule prescribe.

Code Sec. 12882. Such petition shall be printed, and, with proof of service thereof on the opposite party or his attorney, shall be filed with said clerk within sixty days after the opinion is filed.

Code Sec. 12880. If a petition for rehearing is filed, it shall suspend the decision, if the court or one of the judges upon its presentation so order, until after the final decision on the rehearing.

III.

After the decision of the Supreme Court of Iowa complained of herein, was filed the petitioner herein procured from the Supreme Court of Iowa, an order staying the issuance of any procedendo to the District Court which entered the original decree as set out on Page 1959 of transcript. That the decree and judgment of the Iowa courts did not become final and enforceable, under the laws of that state until the procedendo is sent down by the Supreme Court to the lower court, and therefore there is not yet any final decree in the State Court such as would give this Honorable Court jurisdiction under Section 237 of the Judicial Code as amended. The following case supports this proposition:

Ohio River Co. vs. Fisher, (4th C. C. A.) 115 Fed. 929.

The rule of the Supreme Court of Iowa as to procedendo is as follows:

Rule 37. No procedendo shall issue in any case until the expiration of thirty days from the filing of the opinion, except upon an order of the court, or a judge thereof, upon cause shown, and except in criminal cases and cases where petitions for rehearing have been overruled.

The provisions of the Code of Iowa of 1927 on this matter are as follows:

> Code Sec. 12875. If the supreme court affirms the judgment or order, it may send the cause to the court below to have the same carried into effect, or may issue the necessary process for this purpose, directed to the sheriff of the proper county, as the party may require.
>
> Code Sec. 12876. If remanded to the inferior court to be carried into effect, such decision and the order of the court thereon, being certified thereto and entered on the records thereof, shall have the same force and effect as if made and entered during the session of that court.

IV.

The record fails to show that there was any, intentional, systematic, general and habitual method of administering the statutes of Iowa, to the disadvantage of petitioner. The act of the auditor complained of was his individual act, without legal right or authority and contrary to the statutes of Iowa and it was so found by the Supreme Court of Iowa in its opinion as set out in the transcript beginning on Page 1900, this special point being found on page 1914.

The following cases support this proposition:

Davenport Natl. Bank vs. Board, 64 Iowa 140-3;
Jenkins vs. Neff, 46 U. S. L. Ed. 1140;
Barney vs. City of New York, 193 U. S. 430-8;
Ft. Madison Co. vs. Maxwell, 202 Iowa 1346.

V.

Petitioner is not claiming any title, right, privilege or immunity within the meaning of Judicial Code Section 237. There can be no right, privilege or immunity, to be taxed improperly and contrary to law and in a less amount than the law provides, because some one else is improperly and

contrary to law taxed in a less amount than he should be on account of the illegal and improper acts of a ministerial official, such as the county auditor in this case. Petitioner is not claiming that the provisions of the law as to its taxation have not been properly carried out, it admits that they have. What it is claiming is that because certain other persons, who it claims were in competition with it, were allowed by the illegal acts of the county auditor to be taxed at a less rate than the law required, then petitioner should also be allowed to escape a part of its taxes, contrary to law. Thus adding to the wrong already committed against the taxpayers who have been legally taxed and who must make up and pay the taxes escaped by the petitioner and other persons illegally taxed in too small an amount. Certainly no privilege or immunity, under the Constitution of the United States could arise under this state of facts. The Constitution is a shield, and is not for the purpose of perpetuating and increasing a wrong already committed, or to put people on an equal basis by allowing them all to commit the same wrongs. The following case supports this proposition:

State vs. Hall, 54 Southern, 560.

VI.

The petitioner is not entitled to certiorari where the decision of the state court rests even in part on a question of state practice, or on the question of having pursued the wrong remedy. The Supreme Court of Iowa in this case partly at least rested its decision on the ground that petitioner's remedy was by appeal to the board of review, and thence to the District Court, and not by mandamus, therefore petitioner has no right to have that question reviewed by this Honorable Court.

The following cases support this proposition:

Eustis vs. Bolles, 150 U. S. 361-70;
Mo. Pac. Ry. Co. vs. Fitzgerald, 160 U. S. 556;
Griswold Land & Credit Co. vs. Calhoun Co., 198 Iowa, 1240.

The respondents therefore respectfully submit there is no occasion for a writ of certiorari, the petitioner has had its day in court and has had due process of law. The decision of the Iowa Supreme Court should remain the law of the case.

Respectfully submitted,

MAXWELL A. O'BRIEN,
ESKIL C. CARLSON,
Attorneys for Respondents,
With whom are
CHAS. HUTCHINSON AND
GEORGE A. WILSON,
Of Counsel.

APPENDIX.

CERTIFICATE OF CLERK OF SUPREME COURT OF IOWA.

IN THE SUPREME COURT OF IOWA.

Iowa-Des Moines National Bank, Appellant,
vs. In Equity.
J. M. Stewart, et al., Appellees.

CERTIFICATE OF RECORD.

To the Supreme Court of the United States:

I, B. W. Garrett, Clerk of the Supreme Court of the State of Iowa, hereby certify that in the above entitled cause, an appellees' Notice of Intention to Petition for Rehearing was filed in my office on the 25th day of October, 1930, which said appellees' Notice, together with the acceptances of service thereon, reads in words and figures, as follows, to wit:

"To the Appellant, Iowa National Bank, and to Gamble, Read and Howland, its attorneys, and to B. W. Garrett, Clerk of the Supreme Court of the State of Iowa:

You are hereby notified that the appellees in the above entitled cause intend to file a petition for rehearing in the above entitled cause within sixty (60) days after the filing of the opinion of the Supreme Court of Iowa therein.

MAX O'BRIEN,
GEO. A. WILSON,
ESKIL CARLSON,
CHAS. HUTCHINSON,
CARL MISSILDINE,
Attorneys for Appellees.

Service of the above and foregoing Notice of Intention to petition for rehearing is hereby accepted and receipt of copy acknowledged at Des Moines, Iowa, this 25th day of October, 1930.

GAMBLE, READ & HOWLAND,
Attorneys for Appellant.

Service of the above and foregoing Notice of Intention to Petition for Rehearing is hereby accepted and the same filed in my office this 25th day of October, 1930.

B. W. GARRETT,
Clerk of the Supreme Court of Iowa."

And on the 27th day of October, 1930, in the said matter, there was filed in my office an Appellant's Notice of Intention to Petition for Rehearing, a copy of which Appellant's Notice, together with the acceptances of service thereon, reads in words and figures, as follows, to wit:

"To the Appellees, J. M. Stewart, Chairman of the Board of Supervisors of Polk County, Iowa, C. W. Keller, Frank Thornton, C. F. Keeling and E. R. Bennett, members of and constituting the Board of Supervisors of Polk County, Iowa, State of Iowa, and to George A. Wilson, John Fletcher, Attorney General, Maxwell A. O'Brien, Assistant Attorney General, Eskil Carlson, Charles Hutchinson, Carl Missildine, Attorneys for Appellees; to J. G. Cook, County Auditor of Polk County, or to Eskil C. Carlson, his attorney; to Allen Munn, County Treasurer of Polk County, or to Charles Hutchinson, his attorney; and to B. W. Garrett, Clerk of the Supreme Court of the State of Iowa:

Please take notice that the appellant in the above entitled cause, Iowa National Bank, Iowa-Des Moines National Bank, will petition for a rehearing and will, within sixty days after the filing of the opinion of the Supreme Court of Iowa, dated September 26th, 1930, file in the office of the Clerk of said Court, its petition for rehearing. Said petition for rehearing will pray that the opinion filed in the office of the Clerk on September 26, 1930, be set aside and that a rehearing be granted.

GAMBLE, READ & HOWLAND,
Attorneys for Appellant.

Service of the above and foregoing Notice of Intention to Petition for rehearing is hereby accepted and receipt of copy acknowledged at Des Moines, Iowa, this 27th day of October, 1930.

C. S. MISSILDINE, Co. Atty.,
by C. A. B. Asst.,
CHAS. HUTCHINSON,
GEO. A. WILSON,
ESKIL C. CARLSON,
JOHN FLETCHER,
MAXWELL A. O'BRIEN,
Attorneys for Appellees.

Service of the above and foregoing Notice of Intention to Petition for Rehearing is hereby accepted and the same filed in my office this 27th day of October, 1930.

B. W. GARRETT,
Clerk of the Supreme Court of Iowa."

I hereby further certify that the foregoing copies are full, true, correct and complete copies of the appellees' Notice of Intention to Petition for Rehearing and appellant's Notice of Intention to Petition for Rehearing, filed in the said matter; and there is no further record whatsoever in this Court relative to or on either of the said appellees' Notice of Intention to Petition for Rehearing or appellant's Notice of Intention to Petition for Rehearing, and no petitions for rehearing were filed.

WITNESS my official signature and the Seal of the Supreme Court of the State of Iowa, at Des Moines, Polk County, Iowa, this 4th day of March, A. D. 1931.

SEAL

B. W. GARRETT,
Clerk of the Supreme Court.

FILE COPY

FILED
JUL 7 1931
CHARLES ELMORE CROP
CLERK

Supreme Court of the United States

OCTOBER TERM 1930.

~~1930 Term No. 711.~~

1931 Term No. 15.

IOWA-DES MOINES NATIONAL BANK,
Petitioner,

vs.

E. R. BENNETT, Chairman of the Board of Supervisors of Polk County, Iowa, et al., *Respondents.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA.

BRIEF OF RESPONDENTS.

ESKIL C. CARLSON,
MAXWELL A. O'BRIEN,
Des Moines, Iowa,
Attorneys for Respondents.

GEORGE A. WILSON,
CHAS. HUTCHINSON,
on the brief.

INDEX.

Page.

Brief of Respondents 1
Facts as to this Court's Jurisdiction 2
Concise Statement of Case 4
The Issues 4
Statement of Petition 4
Statement of Answer 10
Trial Before Polk County Iowa District Court 13
Concise Statement of Facts 13
As to Whether there was Competitive Capital 14
Alleged Competing Corporations 15
Security Loan & Investment Co. 16
Iowa Investment Mortgage Co. 17
Central Iowa Joint Stock Land Bank 18
Des Moines Morris Plan Co. 19
Continental Securities Co. 20
Iowa Guaranty Mortgage Corporation 21
Federal Cattle Loan Society 23
Garner Investment Co. 24
Jesse F. Stevenson & Co. 25
Farmers Bond & Mortgage Co. 27
Motor Finance Co. 28
Union Mortgage & Cattle Loan Co. 29
Bond & Mortgage Company of Iowa 30
Manning Martin Co. 32
Des Moines Joint Stock Land Bank 33
First & Second Mortgage Corporation 34
Continental Mortgage & Loan Co. 35
Des Moines Discount Co. 35
Bankers Mortgage Co. 36
United Mortgage Loan Co. 36
Merchants Loan & Inv. Co. 37
State Bond Co. 38
Polk County Mort. Co. 38
Corn Belt Land & Loan Co. 39
Guarantee Mtg. & Fin. Co. 40
Nat'l. Inv. & Fin. Co. 41
Burns Bros. Co. 41
Burns Bros. Inc. 41
Banking Business of Petitioner 43
Summary of Argument 45
I Under pleadings and facts mandamus not maintainable 45
II Petitioner's remedy was by appeal to local Board of Review 48
III Acts of taxing officer, even if erroneous or illegal, fall far short of being "deliberate, intentional and wilful acts" as to constitute a violation of Sec. 5219—U. S. Rev. Stat. 49
IV Where state law not in violation of Sec. 5219—but administration is complained of—moneyed capital competition must be as to complaining bank—and in competition with material or substantial part of ordinary and legitimate banking business of complaining bank 50
V Corporations taxed on moneys and credits could not constitute competition because Sec. 5219 provides "moneyed capitals in hands of individual citizens" must be taxed same as National banks, corporations not "individual citizens" 51
VI National banks being restricted as to character and locality of real estate loans they could make, in order to establish competition, bank must show loans could have been made by a National Bank 52

VII There is no discrimination shown between State Bank and other corporations and individuals as to constitute violation of either State or Federal Constitution. The State Banks are creatures of the state and as such have only rights conferred by state 52

VIII Erroneous or even illegal individual acts of taxing officials in no event become a violation of the Constitution to be reviewed and relief obtained by certiorari. The Auditor could have corrected the error but was not requested so to do 53

IX Previous appeals from Board of Review taken by petitioner and suits brought in Federal Court and dismissed constitute adjudications. All objections in this suit either were or could have been raised in those appeals and suits 54

X Taxes complained of not illegal and at most only erroneous. Payment cannot be recovered unless paid under particularly stated protest, which was not done 54

XI The banks were guilty of laches, and are by acts and omissions estopped to make the claims they are now making. Not protesting for years, making no request of Auditor to correct error, appealing from erroneous assessments but not raising present questions, allowing taxes to be distributed to taxing bodies without protest or objections, signing assessment roll and agreeing to pay taxes without objections except as to U. S. Bonds, bringing suit, raising the questions herein, and then dismissing and paying taxes, and many stockholders in complaining banks being stockholders in alleged competing corporations, constitute laches 54

XII The bank is not in equity with clean hands. They have systematically assisted customers in avoiding taxes, have combined to unlawfully decrease interest rate charged to them and to make a charge for carrying small accounts 55

XIII Banks not real parties in interest. If improperly taxed it was stockholders not banks. Banks not entitled to represent them. Present stockholders different than at time of alleged wrongful levy. Defect in parties 55

XIV No discrimination as against banks; because five mill levy properly applied would exceed tax complained of 56

XV Actions barred by statute of limitations 56

XVI No evidence on which to base recovery for taxes assessed as of January 1, 1919, and the 1922 evidence is immaterial 57

XVII Petitioners have not exhausted remedy before Supreme Court of Iowa 57

XVIII Decree and judgment of Supreme Court of Iowa not final and enforceable and petitioners have no right to certiorari to this Court 58

Argument 59

APPENDIX.

TABLE OF TEXTBOOKS

13 Corpus Juris 444, Section 381 167
38 Corpus Juris 770, Section 412 ..... Quoted 168—Cited 47-76
37 Cyc. 1187 ..... Cited 148
27 Cyc. 1131 ..... Cited 76
Ferris on Extraordinary Legal Remedies, Section 306 ..... Cited 46-47-64
Ferris on Extraordinary Legal Remedies, Section 191; ..... Quoted 69
Ferris on Extraordinary Legal Remedies, Section 299 ..... Quoted 69
High on Extraordinary Remedies, Volume 1, Section 283, Sections 121-299 Page 50, Sections 42 and 48 ..... Quoted 67-68—Cited 47-67
Section 141 ..... Quoted 168—Cited 68
Morse on Banks and Banking (5th Ed.) Volume 1, Section 59 Note 4 ..... Cited 50

TABLE OF STATUTES:

	Set Out
Iowa Code 1913 Supplement, Section 1366	168
Iowa Code 1897, Section 1359	169
Iowa Code 1897, Section 1323	169
Iowa Code 1897, Section 1417	170
Iowa Code 1927, Section 7235	170
Iowa Code 1924, Section 12440	170
Iowa Code 1924, Section 12441	171
Iowa Code 1927, Section 12452	171
Iowa Code 1927, Section 12456	171
Iowa Code 1924, Section 7149	171
Iowa Code 1924, Section 6992	171
Iowa Code 1924, Section 11007	172
Iowa Code 1927, Section 12880	172
Iowa Code 1927, Section 8736	124
Iowa Code 1927, Section 12881 Subd. 4	173
Iowa Code 1927, Section 12883	173
Rule 27, Supreme Court of Iowa	173
Iowa Constitution, Sec. 12, Art. VIII ..... Quoted 124—Cited 124	

TABLE OF CASES:

Andrew, Supt. v. Munn, Treas., 218 N. W. 526; 205 Iowa 723 56-149
Addison v. Lowden, 222 N. W. 406 (Iowa) 67
Andrews v. Virginia Ry. Co., 248 U. S. 272 53-161
Bank v. Chapman, 173 U. S. 205 53-122
Bank v. Board of Supervisors, 168 Iowa 501 62
Barney v. City of New York, 193 U. S. 430 53-129
Bells Gap R. R. v. Commonwealth, 134 U. S. 232 53-123
Benjamin v. District Township, 50 Iowa 648 66
Bibbins v. Clark & Co., 90 Iowa 230 45
Blondel v. Woodbury Co., 212 N. W. 335; 203 Iowa 1099 54-132
Board v. First Nat'l Bank, 57 N. E. 778 (Ind.) 56-149
Brownley v. Marion Co., 58 Iowa 487 45
California Bank v. Kennedy, 167 U. S. 362 51
Charlotte Ry. Co. v. Gibbs, 142 U. S. 386 53-126
Charles City v. Ramsey, 199 Iowa 722 67
Chester v. Penn, 134 U. S. 240 53-126
Chi., Grt. W. R. R. Co. v. Basham, 249 U. S. 164 58
Citizens Bank v. Opperhiman, 249 U. S. 448 53-161
Citizens Bank v. Johnston, 202 N. W. 382 (Iowa) 108
Clark v. Board of Directors, 24 Iowa 266 46-65-66
Collins v. Board of Supervisors, 158 Iowa 322 47-71
Cressler v. Brown, 192 Pac. 417, (Oklahoma) 54-137
Davenport Nat'l Bank v. Board, 64 Iowa 140 49-102

Davenport Nat'l Bank v. Board, 123 U. S. 83 50-51-102
Des Moines Nat'l v. Fairweather, 68 (U. S.) 190 L. Ed. 50
Des Moines Nat'l v. Fairweather, 191 Iowa 1240 52
Dickey v. Polk County, 58 Iowa 287 45
District Twp. Spencer v. District Twp. Riverton, 56 Iowa 85 62
Eder v. Fink, 180 N. W. 542 (Minn.) 54-137
Everly v. Jasper County, 72 Iowa 149 62
Evansville Nat'l Bank v. Britton, 105 U. S. 322 92
Farmers Ins. Co. v. Linn Co., 202 Iowa 444 55-138
Farmers Mer. Nat'l Bk. v. Smith, (C. C. A.) 77 Fed. 129 51
Farmers Nat'l Bk. v. Hoffman, 193 Iowa 119 56-150
Farson v. Baird, 63 Law Ed. 233 47-77
Felinciana (In re) Bk. & Tr. Co., (La.) 78 So. 169 56
Finman v. Hughes Co., (S. D.) 225 N. W. 711 55-56
First Nat'l Bank v. Anderson, 269 U. S. 341 49-78-87-91
First Nat'l Bank v. Anderson, 192 N. W. 6, (Iowa) 52-105-106
First Nat'l Bank v. Anderson, 70 (U. S.) L. Ed. 171 50-107-111
First Nat'l Bank v. Anderson, 192 N. W. 98; 196 Iowa 587 50-102-120
First Nat'l Bank v. Board of Review, 201 N. W. 769; 199 Iowa 1124 48-50-52-53-79-105-107
First Nat'l Bank v. Board of Review, 204 N. W. 223; 200 Iowa 131 48-50-79-115
First Nat'l Bank v. Chehalis, 166 U. S. 440 50-51-103-107-122
First Nat'l Bank v. Council Bluffs, 182 Iowa 107 52-56-149-150
First Nat'l Bank v. Hartford, 47 Sup. Ct. Rep. 462 52-83-84-87-91-112
First Nat'l Bank v. Hayes, 186 Iowa 892 53
First Nat'l Bank v. Patterson, 176 Pac. 498 (Colo.) 56-149
First Nat'l Bank v. Weber, 196 Iowa 1155 53-81-129
Ft. Madison Sec. Co. v. Maxwell, 202 Iowa 1346 53-128
Ford v. McGregor, 23 Pac. 508 (Nevada) 61
Gaffney v. Young, 200 Iowa 1030 48-72-73
Georgetown Nat'l Bank v. McFarland, 273 U. S. 568 50-102
Giozza v. Tierman, 148 U. S. 657 53-123-126
Griebel v. Board of Supervisors, 202 N. W. 379; 200 Iowa 143 46-65-66
Griswold Land Co. v. Calhoun County, 198 Iowa 1240 48-79
Hawkeye Ins. Co. v. French, 109 Iowa 585-90 52
Hawkeye Co. v. Marian, 110 Iowa 468 54-139
Head v. Board, 170 Iowa 300 50-56-103-149-150
Hendrickson v. Apperson, 245 U. S. 105 49
Hendrickson v. Creager, 245 U. S. 115 49
Hershire v. First Nat'l Bank, 35 Iowa 272 56
Home Ins. Co. v. New York, 134 U. S. 594 53-126
Home Sav. Bank v. District Court, 121 Iowa 1 48-72-73
Insurance Assn. v. Gilbertson, 129 Iowa 658 127
Interstate Com. Com. v. Merchant Ass'n., 65 L. Ed. 112 47-70
Iowa Mut. Tor. Ins. v. Gilbertson, 129 Iowa 658 53
Iowa National Bank v. Stewart, 232 N. W., 445 (Iowa) 48
Iowa Ry. Land Co. v. Woodbury Co., 64 Iowa 212 47-62-76
Jasper Co. Sav. Bk. v. Board, 202 N. W., 387 (Iowa) 50-108
Jenkins v. Neff, 46 U. S. 1140 (L. Ed.) 49
Jennings v. Coal R. Imp. Co., 147 U. S. 147 53-126
Jewett v. Ayres, 167 Iowa 431 48-72
Lamont Sav. Bank v. Luther, 200 Iowa 180 48-54-79
Langhart v. First Nat'l Bk., 191 Iowa 957 52
Layman v. Telephone Co., 133 Iowa 591 52-123-124
Littell v. Webster County, 152 Iowa 206 47-71
Manning Bank v. Armstrong, 204 Iowa 512 50-103
Mercantile Nat'l Bank v. Hubbard, 98 Fed. 465 50
Mercantile Nat'l Bank v. N. Y., 121 U. S. 138 115-122
Meyer v. Dubuque County, 43 Iowa 592 67
Merchant's National v. Richmond, 256 U. S. 635 52-91-103-106

Milwaukee Malt Ex. Co. v. C. R. I. & P., 73 Iowa 98 65
Murphy v. Supervisors, 215 N. W. 744; 205 Iowa 256 56-158
Missouri v. Duckery, 191 U. S. 165-70 127
Munn v. Des Moines National Bank, 18 Fed. (2d) 269 163
Nelson v. First Nat'l Bank, 42 F. (2d) 30 (C. C. A. 8th) 48
Ohio River Co. v. Fisher, 115 Fed. (C. C. A.) 929 58
Pacific Ex. Co. v. Seibert, 142 U. S. 339 53-123-126
People v. Doty, 80 N. Y. 225 51-52-122
People Ex. Rel. v. Goldfogle, 205 N. Y. S. 870; 211 N. Y. S. 85; 152 N. E. 418 50
People Ex. Rel. v. Peabody, 211 N. Y. S. 114 50
People Ex. Rel. v. Goldfogle, 151 N. E. 452, (N. Y.) 51
Perkins v. Smith, 28 N. E. 21-3, (N. Y.) 51-52-122
Perry v. Board of Supervisors, 133 Iowa 281 66
Pierce v. Nat'l Bank of Commerce, 268 Fed. 487 54-137
Poweshiek Sav. Bk. v. Johnston, 202 N. W. 884; 199 Iowa 555 50-108
Prim v. Fort, 57 S. W. 972 (Texas) 51-122
Prim v. Fort, 57 S. W. 86 (Texas) 51-122
Preston v. Board of Ed., 124 Iowa 355 46-65-66
Primghar State Bank v. Rerick, 96 Iowa 238 52-56-123
Railway Company v. Patterson, 154 U. S. 130; 14 S. Ct. 977 49-78
Redhead v. Iowa Nat. Bk., 127 Iowa 572 56-149
Reinkey v. Wilkins, 179 N. W. 751, (Wisconsin) 54-137
Rankin v. Noel, Co. Commissioner, 185 S. W. 883 (Texas) 48-71
Rice v. Walker, 44 Iowa 458 47-76
Richards v. Wapello Co., 48 Iowa 507 45
Ridley v. Doughty, 77 Iowa 226 53
Ridley v. Doughty, 85 Iowa 418 53-129
Riley v. City of Des Moines, 212 N. W. 716; 203 Iowa 1240 46-48-65-67-72
Sarhy v. Morey, 221 N. W. 492; 207 Iowa 521 46
Scripture v. Burns, 59 Iowa 70 47-70
Slimmer v. Chickasaw Co., 140 Iowa 448 55-137
South Dakota Sec. N. Bk. v. Twindle, 217 N. W. 542 (S. D.) 54-138
Stapylton v. Haggard, 91 Fla. 93 56
State v. Thomas, 152 Iowa 500 66
State v. Hall, 54 So. 560 118
State ex rel. Relief Ass'n v. Mayor, 118 Atl. 640 (Delaware) 48-71
State v. Parker, 147 Iowa 69 66
Stickney v. Bangor, 30 Me. 404 56-149
State v. First Nat'l Bank, 71 L. Ed. 744 112
Sullivan v. Robbins, 109 Iowa 235 47-71
Sweitzer v. Fischer, 172 Iowa 266 66
Taylor v. Taylor, 240 S. W. 6 (Arkansas) 54-137
Universal Loan Corp. v. Board of Review, 219 N. W. 536; 205 Iowa 1391 51
U. S. Express Co. v. Ellyson, 28 Iowa 370 52-125
Village of Winnetka v. Handy, 128 N. E. 805, (Ill.) 54-137
Warren v. Henly, 31 Iowa 31 53
Waterloo Trans. Co. v. Supervisors, 131 Iowa 237 52
Welfare Loan Soc. v. Des Moines, 219 N. W. 534; 205 Iowa 1400 51
Woodbury Co. v. Talley, 147 Iowa 498 47-48-65-67-72-74
Woodcock v. Board of Education, 10 A. L. R. 181 47-76

Supreme Court of the United States

OCTOBER TERM, 1931.

1930 Term No. 711
1931 Term No. 15

IOWA-DES MOINES NATIONAL BANK,
Petitioner,

vs.

E. R. BENNETT, Chairman of the Board of Supervisors of Polk County, Iowa, et al., *Respondents.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA.

BRIEF OF RESPONDENTS.

I.

OPINION OF COURT BELOW.

This cause was decided by the SUPREME COURT OF IOWA, on September 26, 1930, and is reported as Iowa National Bank v. Stewart, et al., and six other cases, in the 232 Northwestern Reporter, page 445-470, both inclusive. The case has not as yet been published in the official Iowa Reports.

The opinion is set out in full, including the dissenting opinion in the printed record at pages 1339 to 1397.

II.

FACTS AS TO THIS COURT'S JURISDICTION.

We believe the petitioners have not complied with paragraph 1 of Rule 12 nor with paragraph c Section 2 of Rule 27 of this court. Therefore we give this as a concise statement as to why the jurisdiction of this court cannot be invoked.

This action was begun by filing a petition in the District Court of Iowa in and for Polk County, March 13, 1926, (R. 5). The issues were drawn in that same court and tried in that court before Honorable O. S. Franklin, one of the judges of that Court, November 7, 1927 (R. 171), and the decree and judgment was entered in that Court November, 26, 1928 (R. 107).

From this decree and judgment the appeal was taken to the Supreme Court of Iowa (R. 1339) and the Supreme Court of Iowa affirmed the lower Court September 26, 1930. (R. 1341) 232 N. W. 445. Following this, on October 27, 1930, the petitioners served on these respondents (Appellees in Iowa Supreme Court) their Appellant's Notice of Intention to Petition for Rehearing. (R. 1410) and on the same date—October 27, 1930, the petitioners-appellants there filed the said Appellant's Notice of Intention to Petition for Rehearing together with acceptances of service thereon in the office of the Clerk of the Supreme Court of Iowa. (R. 1409).

There is no further record as to the Notice of Intention to Petition for Rehearing. (R. 1411).

It is from the action of the Supreme Court of Iowa, that the petitioner seeks relief through the Writ of Certiorari. (Petition for Writ—Page 28.)

In the District Court of Polk County,—the trial court—the issues raised among other things were these procedure and jurisdictional questions.

Plaintiff—petitioner here—has a plain speedy, adequate remedy at law.

Remedy, if any, is by appeal to Board of Review.

Mandamus will not lie.

(Par. 6 of Answer. R. 32).

Matter was adjudicated by Board of Supervisors and appeal only remedy. (Par. 2-3 of Division II of Answer. R. 44.)

Matter was adjudicated by action brought in Federal Court and dismissed (Par. 6—Division II of Answer. R. 48).

That by stipulation plaintiff was bound by results and adverse adjudication of Des Moines National Bank v. Fairweather. (Par. 7—Division II of Answer. R. 49).

The Supreme Court of Iowa in this cause held:

> "As to the first class of competing capital, the plaintiffs had an available remedy by appeal to the board of review and further appeal from the board of review to the district court, a remedy to which they resorted, though they did not therein ask for correction on account of the alleged discrimination of which they now complain." (R. 1346). * * * as to competing capital of individuals and foreign corporations, this remedy was available to the plaintiff to correct errors of which they now complain." (R. 1347).
>
> * * * "As to the alleged discrimination in favor of moneyed capital held by individual taxpayers and foreign corporations, the remedy afforded before the board of review and by appeal was available adequate and exclusive." (R. 1348).

The plaintiff-petitioner here—was bound by the adverse decision and judgment in Des Moines National Bank vs. Fairweather, 191 Iowa 1240, 181 N. W. 459, 184 N. W. 313, and on writ of error to the Supreme Court of the United States, 263 U. S. 103, 44 S. Ct. 23, 68 L. Ed. 191, by virtue of a stipulation to "abide the final judgment" in that, then pending, case, and accordingly in plaintiff's case there was entered

"This case is hereby dismissed by plaintiff * * * in accordance with stipulation." (R. 1214).

CONCISE STATEMENT OF CASE.

To be concise in this case is even to appear to be lengthy because of the large record. This statement cannot avoid both statements of issues of law and issues of facts, the proper conclusion of law and fact both being issues.

The nature of the action is not as stated by petitioners (p. 1153), but, we insist, this is an action in mandamus brought by the National Banks against the members of the Board of Supervisors and the County Auditor and County Treasurer of Polk County, Iowa, to compel refunds of certain taxes for the years 1919 to 1922 inclusive, alleged to be the difference between the amounts correctly paid and less amounts they would have been required to pay had there been applied to them certain illegal classification or rates applied to competing individuals and corporations for the same years.

Because we believe accuracy requires a presentation of the issues, as we see them, we submit this statement of,—

THE ISSUES.

On March 13, 1926, the Iowa National Bank, petitioner, filed its PETITION in the District Court of the State of Iowa, in and for Polk County, Iowa, alleging

Plaintiff is a national bank in the banking business in the City of Des Moines, Polk County, Iowa. Defendants are J. M. Stewart, the chairman and the four other members of the Board of Supervisors, the Auditor, and the Treasurer, all Polk County officers.

This is an action in mandamus for an order upon the defendants in their capacities as members of the Board of Su-

pervisors of Polk County, Iowa, and County Auditor and County Treasurer of said county respectively, directing the said defendants and each of them to refund to the plaintiff herein certain taxes erroneously and illegally exacted of the plaintiff by the said defendants, and by the taxing officers of Polk County, State of Iowa, in the amounts hereinafter specified.

"Plaintiff brings this action for itself and in behalf of its stockholders for the purpose of enforcing a duty enjoined upon the defendants in their official capacities." (R. 6).

That the City Assessor in and for each of the years fixed an assessment against the shares of stock of petitioner—corporation, as follows:

1919	$2,024,957.00
1920	2,039,915.00
1921	2,065,[illegible]6.00
1922	1,902,[illegible]3.00

under the heading "corporation stock" upon Form 1 of assessor's roll. The assessment was sustained by the City Council of the City of Des Moines sitting as a board of review.

That the consolidated levy each year and the tax imposed against the shares of stock in plaintiff company were, as follows:

1919—	Consolidated	Levy—	137.8	mills	on 20%	value—	$55,807.52
1920—	"	" —	127.	mills	" "	" —	64,053.64
1921—	"	" —	164.	mills	" "	" —	67,751.68
1922—	"	" —	160.4	mills	" "	" —	61,341.68

That the shares of stock in each of the years was subject to taxation only as provided in Section 5219 of the Revised Statutes of the United States.

That during the years 1919, 1920, 1921 and 1922, the "assessors and taxing officers of Polk County" included in the

tax lists as "moneys and credits" assessments of shares of stock in various corporations engaged in business of loaning money, notes of individuals payable on demand and otherwise, including notes secured by mortgages upon real estate and upon chattel property, and property pledged as collateral, debenture bonds, bills of exchange, circulating notes of national banking associations and other United States legal tender, notes and other securities, being assessments aggregating

For the year 1919—$24,878,698.00
" " " 1920— 48,961,990.00
" " " 1921— 53,024,705.00
" " " 1922— 49,930,861.00

That "the city assessor of the City of Des Moines and the taxing officials of Polk County" habitually, intentionally, systematically and generally included in assessments of moneys and credits assessments against individuals representing money at interest, including notes, bonds, mortgages representing loans of money, and all other securities and evidences of indebtedness that normally enter into banking business and as come into direct competition with banking capital in the loan market of Polk County, Iowa.

That the "taxing officers of Polk County" did habitually, intentionally, systematically and generally include in the total of moneys and credits taxed at 5 mills on the dollar large sums representing the assessed value of shares of stock of corporations engaged in the business of loaning money, in the purchase and sale of notes, mortgages, bonds, discounting commercial paper, in direct competition with national and state banks in the loan market in Des Moines, said corporations being assessed for

1919—$2,000,000.00
1920— 5,500,000.00
1921— 7,000,000.00
1922— 7,000,000.00

That the assessments against such individuals were for

1919—$1,700,000.00
1920— 2,500,000.00
1921— 2,500,000.00
1922— 2,500,000.00

As a result the tax levied under the consolidated levy, instead of what would have been under the 5 mill levy as follows:

1919—	Consolidated—	$55,807.62—	5	mill—	$10,124.79
1920—	"	64,053.64—	"		10,199.58
1921—	"	67,751.68—	"		10,328.03
1922—	"	61,341.68—	"		9,513.92

That the assessments of the corporations in each instance in each year was made upon assessment roll No. 1, listed under the sub-heading "Corporation stock", that the assessment so appeared upon the assessor's roll when presented to the City Council as a Board of Review, and that the assessments were by the assessor and the board of review classified identically as were the assessments of shares of stock of the plaintiff, "and long after the Board of Review had adjourned in each of said years" the assessments of the corporations were placed upon the tax lists "by the taxing officers" as "moneys and credits", and applied a tax at the rate of 5 mills upon the dollar while the shares of stock of plaintiff were taxed at consolidated levy.

That the "higher" rate was prohibited by U. S. Code, Section 5219.

That plaintiff was discriminated against contrary to the provisions of the Iowa Constitution Section 6, Article I, and Section 2, Article VIII, and the 14th Amendment to the United States Constitution.

That in each year the plaintiff appeared before and filed objections to the amount of the assessment because that dur-

ing the years 1919, 1920, 1921 and 1922 by reason of the intentional, deliberate, systematic and general failure of the taxing officers of Polk County and State of Iowa to follow the provisions of Sections 1310 and 1322-1a of the 1931 Code Supplement in the administration of the taxing laws the plaintiff was discriminated against, and was required to bear an undue and discriminatory portion of the tax burdens of the City of Des Moines, Polk County, State of Iowa, contrary to the provisions of the Constitution of the State of Iowa and of the 14th Amendment to the Constitution of the United States as hereinbefore alleged. That such unlawful action of the taxing officers of Polk County, State of Iowa, constituted an unjust and unlawful discrimination in favor of the shares of stock of competing corporations and moneyed capital in the hands of individual citizens, and in favor of the shares of national banks and banking associations as against the shares of the plaintiff. That such deliberate, systematic, intentional and general course of action in the administration of the tax laws imposed an unwarranted and illegal discrimination against the plaintiff and its stockholders in violation of Section 6, Article I of the Constitution of the State of Iowa in that by such action and course of conduct upon the part of the taxing officers of Polk County, State of Iowa, there was granted to the owners of moneyed capital and corporation stock, privileges and immunities which, upon the same terms, were denied to the plaintiff and its stockholders. That such course of action and conduct in the administration of the tax laws by the taxing officers of Polk County was in violation of Section 2, Article VIII of the Constitution of the State of Iowa in that the property of the plaintiff and its stockholders was subjected to taxation at a higher rate than the property of individuals of the same class and character as that of the plaintiff and its stockholders. That such course of conduct in the administration of the tax laws by the taxing officers of Polk County, State of Iowa, constituted a vio-

lation of Section 1 of the 14th Amendment to the Constitution of the United States in that it deprived the plaintiff and its stockholders of property without due process of law, and denied to the plaintiff and its stockholders the equal protection of the law, and that thereby there was cast upon the plaintiff and its stockholders an undue and unjust proportion of the burdens of taxation in the taxing district of the City of Des Moines, Iowa.

That on November 28, 1923, the plaintiff tendered the County Treasurer in payment of taxes at 5 mills, as follows:

For 1919—on	$2,024,975.00	plus	6%	from	Mch	30,	1921—total—		$12,349.96
1920—"	2,039,915.00	"	"	"	"	"	"	"	11,829.10
1921—"	2,065,606.00			"	"	"	1922—	"	11,353.99
1922—"	1,902,783.00			"	"	"	1923—	"	9,892.29
									$45,425.34

and the tender was refused.

That the treasurer demanded plaintiff pay taxes upon its shares at the consolidated levy rate with interest and penalties, and threatened enforcement with seizure and sale of plaintiff's property. To prevent the sale and accumulation of penalties, November 30, 1923, plaintiff under written protest paid the county treasurer

For 1919	Taxes	$55,807.62	Penalties	$25,113.43
1920		64,053.64		24,340.38
1921		67,751.68		17,615.44
1922		61,341.68		4,907.33

September 15, 1925, plaintiff filed a written demand with the County Auditor and Board of Supervisors for the return of taxes "illegally and erroneously" exacted from plaintiff for the years 1919, 1920, 1921, 1922. No refund has been made or ordered and no action on the demand taken.

Plaintiff is without speedy and adequate remedy at law

and without mandamus plaintiff will sustain great irreparable injury.

WHEREFORE, plaintiff prays "for itself and in behalf of its stockholders" a writ of mandamus ordering defendants to refund the plaintiff the following sums for taxes, interest and penalties illegally and erroneously exacted of the plaintiff:

For 1919—Penalties and interest	$25,113.43
1919—Taxes	43,457.66
1920—Penalties and interest	24,340.38
1920—Taxes	52,224.54
1921—Penalties and interest	17,615.44
1921—Taxes	56,397.69
1922—Penalties and interest	4,907.33
1922—Taxes	51,449.39
	$275,505.86

and prays costs and general equitable relief. (R. 17.)

To this petition, the defendant-respondents filed their

ANSWER

setting forth the issues, summarized, as follows:

1. General denial except as to specific admissions.
2. Admission of official capacity of defendants and corporate capacity of plaintiff.
3. Admission of levy on plaintiff's property substantially as alleged.
4. That monies paid each year have been distributed to various political subdivisions;
5. That no part of the money is under defendants' control or custody.
6. That defendants have no money under their control or custody out of which to refund, if court would so decree.
7. Statute of Limitations:

8. Laches under allegations of plaintiff's petition and in fact;

9. Estoppel by reason of laches;

10. That plaintiffs have plain, speedy, adequate remedy at law;

11. That plaintiffs' remedy, if any, is appeal to courts from Board of Review;

12. That plaintiffs are not entitled to mandamus under allegations nor under true facts;

13. That failure to deduct U. S. bonds and savings stamps from assessment, was strictly in accordance with law;

14. That any error or intentional illegality on the part of taxing officers cannot be corrected in this proceeding;

15. That plaintiffs, seeking equitable relief, must do equity, and the plaintiffs have during all the years complained of habitually, intentionally, systematically and generally aided and abetted and encouraged its customers to evade taxation and conceal property from taxation, and such an amount is far in excess of amount sought to be recovered from defendants;

16. That plaintiffs are not real party in interest, because taxes in reality paid by and charged to stockholders, and stockholders alone, if any, have right to seek recovery;

17. That plaintiffs were not assessed but the several stockholders were assessed;

18. That there is a defect of parties plaintiffs in that stockholders assessed are not parties nor seeking recovery.

19. That plaintiffs have not been discriminated against by method provided by Statutes of Iowa nor by method under which plaintiff's stockholders were assessed.

20. That an assessment of five mills on all the monies and credits held and owned by the plaintiffs would exceed taxes assessed and plaintiffs are not damaged.

21. That stockholders assessed are also persons complained of as competitors of themselves, and they have acquiesced in the assessments under the two plans, and cannot be heard to complain.

22. That the Board of Supervisors have acted upon the petition of plaintiffs asking this same refund, and refused the refund, and such action is a judicial deter-

mination from which only an appeal or certiorari will lie and mandamus is not tenable;

23. That the plaintiffs were guilty of laches and have waived and are estopped to complain in that they

a. With knowledge in 1919 and 1920 of basis of objections and that monies collected would be distributed, plaintiffs signed and approved assessment rolls;

b. Made no objections except in appeals from Board of Review, in each instance decided against plaintiffs;

c. Made no complaints to taxing authorities;

d. Made no complaint to County Auditor;

e. Never called attention of County Auditor or County Treasurer or any taxing officials, names of individuals or corporations erroneously assessed;

f. Took no appeal from Board of Review in assessments of others in alleged competition with plaintiff;

g. Permitted Municipal corporations to make expenditures and incur indebtedness relying upon the collection of taxes;

h. Waited until taxes were expended and distributed, as to be impossible of recovery by taxing bodies;

i. Permitted funds to be expended for current expense and maintenance and not in interest producing investments, and plaintiff seeks not only return of principal but interest.

24. Plaintiffs are not authorized by stockholders by and for whom taxes were paid to bring these suits.

25. The stockholders at time of commencing of suit are not same stockholders who and for whom taxes were paid, and there is no authority express or implied to represent those who were before but not stockholders at time of commencement of suit.

26. The plaintiff in 1922 or 1923 brought suit in the District Court of the United States, Southern District of Iowa, in injunction on similar or same allegations, and said cause was adjudicated adversely to plaintiff. If not adjudication, payment of taxes after dismissal, was laches.

27. By stipulation the adverse holding in Des Moines National Bank v. Fairweather was an adjudication of plaintiffs' claims in this matter.

28. That the decree, in the cause of action brought by Des Moines National Bank v. Bennett, et al., referred to in Count II of plaintiff's petition, does not constitute an adjudication in that,

a. The plaintiffs are not privy to said action.
b. There is not the same evidence.
c. The issues were not identical.

(R. 31-52.)

This cause was called for

TRIAL BEFORE POLK COUNTY DISTRICT COURT OF IOWA, IN EQUITY,

November 7, 1927, and a long trial was had, in which 5078 pages of oral testimony was given and 1817 exhibits were offered. There was then, as is now evident, a disagreement as to what the important issues were, and as will appear there is a dispute now as to the facts as proven and disclosed. This prevents our making a bare statement of facts, but within justifiable practical limits we submit our

CONCISE STATEMENT OF FACTS

as being in accordance with the rules of this court.

Down to and through the paragraph on page 10 of Brief of Petitioner referring to the case of Des Moines National Bank v. Fairweather, we find no inaccuracies as to fact statements relating to the cause, but at that point on, inferences and statements are made which we believe are expressions of contention rather than fact, so we state the facts as we believe them established by the testimony, avoiding contentions as best we can.

On November 28, 1923, the petitioner made a tender in

the form of Exhibit 1771—(Record 880), declined "because the amount offered was not the amount shown by the tax lists of the county as against the amount to be collected". (Record 596). There is no testimony of any demand with threats unless attached to Exhibit 1766 and it is not in this record.

(See record 585 and 875).

AS TO WHETHER THERE WAS COMPETITIVE MONEYED CAPITAL.

At the outset we correct the inference or assumption of plaintiff where it says on page 13 of its Brief:

> "Since it is conceded by the majority opinion of the Iowa Supreme Court that the shares of these corporations constituted a relatively material amount of moneyed capital within the meaning of Section 5219 of the Revised Statutes of the United States, we shall not burden * * * etc."

This is not correct. The Supreme Court of Iowa in its opinion says:

> "During these years a large number of domestic corporations employing, *as we shall assume*, moneyed capital in competition with plaintiff in Des Moines in like form made to the assessors their sworn statements." (Record 1901).

This is, we believe and assert, only an assumption for sake of argument and is not "conceded by the majority opinion."

We do not reiterate all the statements made in plaintiff-petitioners' brief as much of it is unavoidable in the argument.

By failure of categorical denial we do not wish to be held to have accepted petitioner's statements as accurate.

In the brief petitioner states: Page 16:

"Substantially all phases of the loan and investment business were carried on in the City of Des Moines during the four years in question by these corporations."

This statement we believe to be one of contention and the facts established show the business as carried on in the banks was not the loan business as carried on by these corporations but was distinctly different and the corporation business instead of being competitive was the doing of that which the banks could not do and enhanced the bank business instead of competing with it.

The same is true of "certain foreign corporations" discussed under petitioner's classification "B" and is true of the individuals. Instead of being "competitors" they were all "customers" of the plaintiff or other banks taxed as plaintiff was, and their very business made them customers.

Since plaintiff-petitioner, by virtue of its assumption that the matter is determined, has not stated the record facts in its statement of the case, we feel compelled so to do and submit a statement of facts as to the

"ALLEGED COMPETING CORPORATIONS".

References are made to the printed Record in this court thus (R. .....). However, there was certified to the Supreme Court of Iowa, by the Clerk of the District Court of Polk County, the "Transcript of testimony", being 5079 typewritten pages. Reference is therefore made also to the Transcript page thus (Tr. 1-100), and are the same references as made in the record certified to this court by the Clerk of the Supreme Court of Iowa, pages 1638 to 1666 inclusive, and the recital of facts there stood unchallenged, pages 1805-1891.

SECURITY LOAN & INVESTMENT CO.
(Tr. 299-336)

This company was affiliated with the Security Trust & Savings Bank "and any really banking business * * * was done with the bank and not with the Security Loan & Investment Company." (R. 204.) The largest simgle customer of the "company" was the Penn-Mutual Life Insurance Company, handling probably one-fourth of all the company's loans. (R. 204.) The Security Loan & Investment Company operated on money borrowed from the plaintiff banks and the Des Moines National (R. 204.) Most of the business was done on borrowed capital received from the banks, on a transfer of the loans to the bank upon a resale agreement and the banks never once complained of any "competing or interfering" with the plaintiffs (R. 205.) Most of the loans held by the company were up as security with the banks from whom money was borrowed (R. 205.) During the four years the company had second mortgages and when it sold them, it usually guaranteed them. (R. 206.) The Cmpany also as a habit made loans in excess of fifty per cent of the value. One mortgage would be for the fifty per cent amount (R. 206) and a second mortgage for the balance. These excesses amounted to $350,000 of the assets. Sometimes the notes of the loan were in excess of 50% of the value of the security and the last notes were guaranteed by the company. (R. 1102 Den. 6.)

It loaned money on buildings in process of construc and advanced moneys to cover costs as construction gressed. (R. 209.)

Practically, all real estate loans were for five years. (R. 207.)

The company had in 1919 $84,619.00 total capital and surplus (R. 1102.) Cash on hand was $59,000.00 and Liberty Bonds $19,100.00. All the balance of $617,234.00, except $5,-

500,00 was borrowed capital, borrowed from the banks on which interest was paid to the banks. (R. 1103, Den. 8.) In 1920, 1921 and 1922 the same situation was true as of 1919. The company did business as a Trust Company because it could do more business on a small capital than a bank could. The company financed the promotion of subdivisions of land (R. 210.) The financing of buildings were of the type of loans that banks would not make. (R. 210.)

IOWA INVESTMENT & MORTGAGE CO.
(Tr. 378-396.)

The president testified the business of this company was "making real estate first mortgage loans" in Des Moines. The company was loan correspondent of the "Prudential Insurance Company of Newark, New Jersey" (R. 218.) The loans were "made for the Prudential" on improved real estate in each instance. (R. 218.) There was no fixed rule of percentage of value of real estate as to loan. The monthly payment plan would be a loan of larger amount than a direct loan without monthly payments. Direct loans were tried to be kept down to forty per cent of valuation according to Prudential appraisers. *"We did not make the loans ourselves, but they were Prudential loans made on their mortgage blanks and their notes. We simply handled them as their correspondent."* (R. 219.)

The bulk of the business was for the Prudential (R. 219) and the Iowa Investment did not invest its funds in these loans. (R. 219.)

The Iowa Investment & Mortgage Company made other loans. Very few farm loans, mostly city property. A few were second mortgage loans. Second mortgages were not taken as a practice but for a commission on the first mortgage. The Iowa Investment & Mortgage loans were for five years. The loans were made to sell at a profit. The pro-

ceeds could not be kept track of because the company always owed the banks money. The loans were sold in Iowa and foreign states. (R. 220.) No record of the volume of business done was kept. (R. 220.)

The Iowa Investment did not deal in short time paper, except where a loan was sold and a balance of purchase price was evidenced by the note. (R. 219.) Some of the Prudential loans were for 142 months. Monthly payment mortgages were loans up to sixty per cent of the valuation. The Iowa Investment merely acted as fiscal agent of the Prudential. (R. 219.) If the money was advanced before approval by the Prudential, the money was borrowed from the Peoples Savings Bank and interest paid to the bank. (R. 223.) The company handled no funds other than Prudential and not its own capital (R. 223.) In some instances a mortgage second to Prudential would be made in order to reach the amount the borrower had to have. (R. 93.)

CENTRAL IOWA JOINT STOCK LAND BANK.

(Tr. 377-414.)

This company was chartered by a special act of Congress, The Federal Farm Loan Act, for the purpose of making farm loans under the supervision of the Farm Loan Board, having bonds issued against these farm mortgages which were placed in the hands of the government trustee and selling the bond. They made first mortgages only in Iowa and Southern Minnesota. The loans were supervised in every detail.

The mortgages were deposited with the government registrar, and, if approved, the government issued bonds to the registrar and he signed the bonds and the bonds were given to the Land Bank for sale. They were sold in Chicago and New York, in bulk to bond houses. The president could not tell how many of these bonds were out in 1919 to January, 1922.

The item $771,200.00 bills receivable on Exhibit "1406" tax return for 1919 was probably mortgages made and on hand and not yet transferred to the Registrar, but of this the president was not sure. The company held U. S. Liberty bonds $254,248.00. He could not explain and did not know what was the item $1,350,235.00 on Exhibit "1407".

The loans were all for 33 years amortized (R. 224.) No other organizations made this kind of loan except Joint Stock Land Banks (R. 224.) Money to carry on the business was borrowed from the Peoples Savings Bank and Central State Bank and the company paid interest on the loans (R. 224) and carried deposits in those banks. The president was a stockholder in both the Peoples Savings Bank and Central State Bank (R. 225.)

DES MOINES MORRIS PLAN COMPANY.
(Tr. 507-540.)

Charles H. Bryant, the president, testified, the company was in 1919, 1920, 1921 and 1922 engaged in the business of loaning money evidenced "in a form peculiar to our business." Loans were made to the borrower who must have two additional joint makers. (R. 248.) During the period automobiles were financed by purchasing trade acceptances, with conditional bill of sale covering the automobile, from numerous dealers in Des Moines and adjacent towns. The trade acceptances were negotiable instruments secured by endorsement of the dealer due in installments provided for in the body of the instrument. (R. 249.)

The automobile paper drew no interest except after maturity. They were bought at eight per cent discount. There was similar financing of washing machines and other household appliances; handled the same as the automobile paper. (R. 250.)

Investment certificates were issued by the bank or a cer-

tificate of indebtedness with interest, perpetual in form, callable on 30 days by the investor or bank.

In four years, about $2,500,000 of automobile paper was used and about $100,000.00 household appliance in one year. All paper sold was confined to trade acceptances. The bank never discounted its own notes.

The Morris Plan Bank was organized to defeat the loan shark. The bank dealt with the class of people not having credit at a bank and could not obtain credit at a regular banking institution. (R. 254.)

Certificates were issued by the Auditor of State entitling the bank to a qualification for tax purposes under the acts of the 38th G. A.

Loans made by the bank are not desirable loans in the general banking business. Twenty per cent of the business is referred by the local banks. (R. 256.) No checking accounts are carried in the bank.

CONTINENTAL SECURITIES COMPANY.
(Tr. 543-563.)

Marion D. Woods, who was secretary of the company, testified:

The company was engaged in "largely" first real estate mortgage business. The real estate was in Iowa usually close to Des Moines. The loans were made according to a schedule which the company "tried to follow" being between forty and fifty per cent of the value. Some construction loans for the financing of building homes were made, but not many. (R. 257.)

The loans were sold to investors largely locally, but a great many were sent to different parts of the country. Purchase moneys received were reloaned. The certificates were purchased only to protect mortgages held. Most of this was in Oklahoma. Some local improvement bonds were handled,

and "some, not a great deal" financing was done of public improvement contractors. The arrangements were the company bought the bonds, agreeing to pay as the work advanced, and when the job was finally completed, the bonds were turned over in settlement. (R. 258.) The contract was not assigned and only in one instance did they take personal guarantee.

Advances only amounted to $80,000.00. Bonds were purchased below par. (R. 258.)

Debenture bonds were issued secured by mortgages held by the company. The company did in 1912 to 1922 $150,000.00 to $200,000.00 per year. The total highest amount of debenture bonds was "not in excess of $50,000.00" and in 1919 $10,000.00 (R. 259.) A few second mortgages were handled. No deposits were accepted and there was no discounting or rediscounting of short time commercial paper. (R. 130.)

IOWA GUARANTEE MORTGAGE CORPORATION.
(Tr. 56[illegible]587.)

J. D. Adelman, the president since 1920 and prior thereto secretary, testified the company is organized under the laws of South Dakota, with its principal, operating place of business in Des Moines and its principal office in Pierre, South Dakota. (R. 261.) The general business was discounting conditional sale contracts covering the sale of automobiles on the deferred payment plan. In 1919 and 1920, some business was done by an automobile distributor selling cars to the Mortgage corporation, who in turn placed the car on the dealer's floor upon a trust receipt. (R. 261.) After 1920 the earnings were by way of discount on sales contracts of automobiles sold by the dealer to individuals (R. 261.)

The notes on Exhibit "103" may be either stock notes or dealers notes (R. 1109.)

The notes in Exhibit "583" for 1920 were $347,000.00 money borrowed from the banks and "other notes" $163,223.00 were stockholders notes. Exhibit "620" notes for 1921 $321,-339.00 were automobile notes acquired by discounting installment sale contracts. (R. 262.) The same is true of items $142,000.00 on Exhibit "1477" for year 1921. This business was done in Iowa. The notes and contracts were trusteed with the plaintiff, Des Moines Savings Bank and Trust Company for the purpose of issuing collateral gold notes or bonds. The bank was paid for this service (R. 262). The bonds were sold to banks in Iowa and Illinois. None sold to individuals. These sales furnished turnover of capital.

Automobile paper handled in 1921 was $411,751, 1922 $606,999, 1919 $1,013,740, and 1920 $1,179,032.

Automobile contracts were where title remained in the dealer and the buyer bought on installments over a 12 months' period. The discount was nine per cent. They were always purchased at the beginning of the deal. No banks, so far as known, were doing that business. The contracts were not endorsed by the dealer and the mortgage corporation took its own chances. The only security was the ownership of the cars.

The other method of financing during 1919 and 1920 was the cars would be sold by the distributor to the Mortgage Corporation. The Corporation would place the car on the dealer's floor, take a trust receipt, and an acceptance signed by the distributor and accepted by the dealer payable on a certain date. The distributor is the wholesaler. The distributor was paid and made a bill of sale to the mortgage corporation. The corporation in delivering to the dealer took a trust receipt and retained ownership of the car. (R. 264 & 1108.) If the dealer sold on contract, the corporation took the contract in payment of the acceptance (R. 264.) The corporation borrowed money during these years from the Iowa National Bank, Iowa Loan & Trust Company, Valley

National Bank and Mechanics Savings Bank. None of the banks complained that the corporation was in competition. (R. 265.)

FEDERAL CATTLE LOAN SOCIETY.
(Tr. 657-683.)

This was a South Dakota corporation, engaged in loaning money on cattle in 1919 and 1920. The loans were evidenced by notes and chattel mortgages on the cattle. Customers were sent through the country banks. Applications were left with the country banks. Loans would be for six months, sometimes shorter. 1920 assessment roll, Exhibit "584", shows $144,241 of notes or cattle loans. The cattle were "feeder" cattle. The 1921 assessment roll, Exhibit "1480" shows notes and mortgages $50,000 all Chattel Cattle loans. (R. 275.) The other item, $267,453.31; is stock notes given for corporation stock.

The cattle loans were sold to the banks to turn the capital. None of the loans were made through Des Moines banks (R. 275.) No bank objected to the business but were assisting in securing the loans. Only loans were accepted in excess of what the bank could loan legally. Interest rate was higher. (R. 276.) No loan was taken that the bank could handle and loans were sold in Chicago. They were offered to the Iowa National Bank and Valley National Bank who declined them (R. 277).

The cash assets were on deposit in the Iowa National and Valley National Banks. These two banks declined the loans because the banks did not consider them safe (R. 278.)

No business was done in 1919. The company only actually operated in 1920 (R. 278.) There were no correspondent banks in Polk County (R. 280.) Endorsements of the paper by the company were unqualified (R. 280).

GARNER INVESTMENT COMPANY.
(Tr. 614-639.)

H. W. Garner testified this is a corporation organized some time in 1919 and during the years of 1919, 1920, 1921 and 1922 was in the Valley National Bank Building. The organization's capital was $50,000.00 paid in 1919. The business was that of the purchase or investment or re-sale of notes, mortgages, bonds and at the suggestion of plaintiff's counsel, stated: "They also dealt in negotiable securities that are generally dealt in the business world". The company chiefly dealt in notes and certificates of deposits of banks. The banks in which certificates of deposit were discounted or purchased were Des Moines institutions and were purchased from the people in the vicinity of Des Moines. They were certificates of deposits in the Central Trust Company and they were purchased outright. There was no security other than the certificate itself. The notes purchased were signed by individuals arising in certain business connections and offered to the company for sale. They were all located in Iowa. The majority of them originated around and near Des Moines. They were for sixty and ninety days and for three months, six months and one year. They bought them at a discount and made some investigation as to the solvency and financial responsibility of the makers of the notes. They were endorsed by the party from whom they made the purchase. The company made sales of the certificates of deposit and of the notes, all in Iowa to banks or other investors.

The company did no advertising but received its business by personal solicitation. The company handled bonds and the purchase of blocks of bonds from the dealer, usually by means of borrowed money from the banks together with company funds and then re-sold the bonds to individual investors located in this vicinity. The company made no mortgage loans direct but purchased for investment and held cer-

tain mortgages but no appreciable amount was held in 1921 or 1922. In those two years the general nature of the business was selling bonds.

The entire note business in 1919 and 1920 would amount to $150,000.00. The mortgages were less and very few were sold. The bond business in 1921 and 1922 was probably $200,000,00. No municipal or government securities were handled. No collateral bonds or debentures were issued. The notes were bought at a discount and the company did not run a bank and the paper did not have to have a bankable character, and the notes were bought without recourse and there is no uniformity in the form of the notes. Money was borrowed from local banks and securities purchased were deposited as collateral for the money borrowed. They often had possession of the collateral merely for the purpose of sale. The bank loaned the money for the specific purchase of the bond and for the purpose of making the transaction possible. The bank at no time complained that the company was competing with their business and "I did not believe we were".

The mortgages purchased were usually over three years and the majority of them were Minnesota mortgages. The bonds purchased were industrial bonds entirely. (R. 266-272.)

JESSE F. STEVENSON & COMPANY.
(Tr. 718-734.)

The president of the corporation testified the company were dealers in investment securities, making farm loans on Iowa properties, loans on business and residence properties in the City of Des Moines, also handled and dealt in strictly municipal bonds in connection with city improvements, paving, sewer, etc. The mortgages were sold as quickly as could be done but some were kept longer than was anticipated.

Most of the mortgage loan business was done on the company's own paper, payable to itself. The mortgages were sold to individuals and to insurance companies. The only company for which it solicited business in the way of mortgage loans was the Connecticut Mutual Life Insurance Company. In those cases the forms of the insurance company were used.

The exclusive territory was Polk County but a few loans were made in other counties with co-operation of solicitors in those counties and they were all in close proximity to Polk County. Most loans were made on residence property other than in the City of Des Moines, and on no business property other than in the City of Des Moines.

The company sold and bought the entire issue of public improvement bonds but they were handled largely to supply the demand of individuals that wished that class of security. Most improvement bonds were obtained by the company entering into a contract with the contractor who had the special job agreeing to purchase the securities to be issued at a certain discount. Some time money was advanced on the contract, usually in the larger transactions. When the securities were ready for delivery there was an accounting made and the balance was paid. An assignment of the contract or the proceeds of the contract would be taken. The dealings were entirely with the contractor. There were some occasional transactions with municipalities but very few. Contracts were bought or financed in Newton, Creston, Hedrick and Malvern, Iowa. When money was advanced, a note was taken for it and interest charged. The bonds so purchased were sold by the company to its regular clients. Some United States Liberty Bonds were held but it was a mere matter of accommodation to the people that would come in that bought them. When received, they were usually shipped within a day or two to a Chicago house.

There may have been one or two drainage contractors financed but not to any extent.

In the loans made for the Connecticut Mutual Life Insurance Company, the commission was always paid by the borrower. These loans were exclusively farm lands. A few large loans were made on business properties and while they may not have been made direct to the company, they were at once turned over to the insurance companies but really sold in advance. (R. 286.)

Sometimes farm loans were split into first and second mortgages. In addition to special improvement bonds, some general and direct obligations for municipalities, school districts, etc., were handled. Money during this period was borrowed from the Valley National Bank, Commercial Savings and the Mechanics, and the Bankers Trust and Central State Bank, and this was especially heavy in 1920.

At the time the money was borrowed, the matter was discussed with the officers of the bank as to the purposes and the mortgages or certificates purchased by the proceeds or other securities would be put up as collateral.

There was never any suggestion of an objection on the part of the Valley National Bank or any of the banks, and as a matter of fact they were glad to get the paper. The company gave a note for the money borrowed. In fact, the banks requested some of the company paper and the company was unable to meet the demand. Short time paper was not a part of the business of the company. No deposits or checking accounts were accepted. (R. 285-291.)

FARMERS BOND & MORTGAGE COMPANY.
(Tr. 738.)

The president of this company testified the company was organized in 1920 and the company has been engaged in the business of negotiating first mortgage loans on Iowa land

and on some city property. As a rule, there were no loans on other city property than in Des Moines, possibly once at Maxwell. Loans were made in Polk, Story, Jasper, Madison, Greene, Warren, Union, Clark, Boone and several other counties.

When the loans were made, the company negotiated them and sold them to insurance companies mostly. Few mortgages were sold to private investors. The first mortgage certificates were issued by mortgages being deposited with the Bankers Trust Company and trustee and the certificates issued against the mortgages and countersigned by the trustee. Interest was paid on the certificates. The certificates were collateral by either side prior to any interest date. They were first issued in the latter part of 1920 at the highest amount outstanding of $140,000.00. Most of the loans were five year loans. Occasionally a seven year loan and an amortized loan, a thirty-three year loan for an eastern insurance company were made.

The company borrowed money from the Bankers Trust Company, the Iowa Loan & Trust Company Bank and also from the Valley National Bank, who knew of the transactions and the purposes of the borrowing of the money to make loans and no objections were at any time made by the banks.

The company did not receive deposits or any checking accounts or issue drafts or other evidence of exchange and no savings accounts. (R. 292-298.)

MOTOR FINANCE CO.
(Tr. 790-799.)

This was a partnership composed of M. W. Engleman and Joe Gottstein, operating during the years of 1921 and 1922. The business consisted in buying automobile contracts from dealers, the contracts representing the balance of the pur-

chase price and in a few instances they made direct loans on automobiles to owners of cars.

The indebtedness was evidenced by a note and a chattel mortgage upon the car. Loans were obtained by personal solicitation among the local car dealers and by advertising through the mails.

The first year all of the business was done in Des Moines and later out of the State and in one or two instances outside of the State, some in Minnesota. Business was done in Ames, Nevada, Hampton, Iowa Falls and Mason City.

The company held the notes themselves and purchased them by discounting. The earnings were of the original discount and the interest on the notes.

In addition to the personal funds of the partners, money was borrowed from the banks. Notes made and purchased were kept until maturity.

The company did not receive deposits or honor checks or drafts. In 1921 and 1922 about $100,000.00 business was done. (R. 298-30.)

UNION MORTGAGE & CATTLE LOAN COMPANY.
(Tr. 800-810.)

The secretary, who first became connected with the company in March, 1921, testified that the company was organized in May, 1919. A large part of the business was second mortgages on Iowa farm land. A few first mortgages were taken and quite a few chattel mortgages on cattle. The mortgage loan business was a great part of the business and second mortgages far exceeded the first mortgages. The land upon which loans were made was located exclusively in Iowa—pretty well scattered throughout the State.

Indebtedness was evidenced by a note and mortgage securing it. There was an application for the loan and an appraisal was had. The corporation became defunct.

Cattle loan business was started in the fall of 1919.

Indebtedness was evidenced by notes and chattel mortgages, being first liens on the cattle. The cattle were ordinary feeding stock and the loans ran from sixty days to six months.

Loans were made to farms anywhere in Iowa. The mortgages were made for the purpose of permitting the borrower to purchase cattle and were made for the purpose of giving him time to prepare them for market, with the understanding that the cattle would be marketed and the notes liquidated from the proceeds of the sale.

Loans varied. The largest one was $25,000.00 and the smallest one about $1,000.00. The average was about $2,000.00. The amount of business was probably $100,000.00.

The company was flooded with applications. Circulars were sent out and the company was advertised through salesmen. There were some stock salesmen. (R. 300-301 and 317-328.)

BOND & MORTGAGE COMPANY OF IOWA.
(Tr. 811-841.)

This company was a corporation and the auditor testified that it was incorporated in 1918 and the business was investments, buying and selling bonds and mortgages, notes and securities of different kinds, and in making of mortgage loans on real estate, both farm and city. The properties were confined mostly to Des Moines and some nearby territory. Some loans were made in Newton and Indianola. The bulk of the loans were sold to insurance companies. All loans were sold to eastern companies, particularly the Metropolitan Life Insurance Company of New York and the Western & Southern Life Insurance Company of Cincinnati, Ohio.

The loans were made to the Bond & Mortgage Company

and then assigned to the Metropolitan Life Insurance Company.

In the years 1919, 1920 and 1921 the volume of the business done was probably $400,000.00.

The company handled bonds of various types, government, municipal bonds and very few industrial. Municipal bonds were special assessment bonds and some school bonds. They were purchased from the contractors. In other words, the contractor was provided with the funds to proceed with the work and upon the completion of the work, the bonds were turned over.

The bonds were purchased at a discount and were then sold to clients and investors who lived at varions points throughout the State and one in Nebraska who took a number of them. Bonds were sold mostly in small lots. Investors were clients, stockholders and others obtained through advertising. Some automobile notes were handled. These were given as part of the purchase price on automobiles, secured by a conditional bill of sale. They were bought from the dealer at a discount and then collected usually in monthly payments. These were local dealers. About $50,000.00 in that type of paper was kept working.

The volume of business so handled was probably $100,000.00.

A large volume of farmers notes were purchased. These were unsecured notes made by individuals purchased through one source. They were discounted and endorsed by the party from whom bought. He resided at Newton. The purchase of these notes amounted to $800,000.00 or $900,000.00. Farm loans were made in Missouri—none in Iowa.

The total capital issued in 1919 was $37,770.00. The amount of bonds handled would probably total $1,000,000—that is, the total turnover. Almost all the loans made and sold to the insurance company were fifteen year terms and were usually submitted to them before closed and the insur-

ance company had its appraisers and the corporation its appraisers. The notes purchased were from Mr. Gifford at Newton, who was promoting a manufacturing concern. They were given for merchandise to be delivered at a future time, supposed to be stock food. The notes were sued upon on the basis that the company was an innocent holder for value and in every case tried the jury or the Court held otherwise. Gifford went into bankruptcy and a large number of the makers of the notes and those sued upon were held not to be the owner for value in due course before maturity.

The automobile notes purchased usually spread over a period from six to ten months, during the time the company borrowed money from the Valley National Bank and put up collateral for the loan and told the bank why they were borrowing and the bank did not complain and the bank, knowingly, for the purpose of increasing the corporation's business, permitted the corporation to borrow without any complaint and wished the corporation success. (R. 301-307.)

MANNING MARTIN COMPANY.
(Tr. 842-854.)

The president of this corporation testified that in 1919 to 1922 the company loaned money on Des Moines real estate. Some loans were made in Fort Dodge. They were purely first mortgage loans. Some respect was paid to the appraised value of the property and some depending to some extent on the moral risk. There was no rule with respect to the value of the property except on the judgment of the officers of the company and appraisement and investigation was made as to the responsibility of the borrower.

No mortgages were bought from individuals. Loans were made to individuals, banks and life insurance companies. Some were sold in Chicago, a majority of them in Des

Moines. Ninety per cent of the loans were on residential property.

The total business on five years was one million and a quarter to one million and a half. Money was borrowed to run the business from the Valley National Bank and the Peoples Savings Bank. At times the company owed the banks $30,000.00 to $50,000.00.

Stockholders of the company were C. H. Rosenbaum of the Bankers Life and Mr. E. H. Slininger of the Peoples Savings Bank, W. B. Brown, attorney, and Charles Martin of the Peoples Savings Bank. Some of the loans were sold to the Peoples Savings Bank. Some loans were temporarily taken off the company's hands by the Iowa National Bank. They knew what the company was borrowing money for and were glad that the company was making city loans and wanted the money to finance it and there was no objection nor any suggestion that the company was interfering with or in competition with the bank's business and never refused to loan money on that account.

No savings deposits or checking accounts were carried by the company. Some loaning to contractors to enable them to build houses was done, but it was a very hazardous business. (R. 307-309.)

DES MOINES JOINT STOCK LAND BANK.

(Tr. 873-881.)

The president testified that the company's office was in Des Moines. Its business was making farm loans on mortgages on "the amortization plan as authorized by the act of Congress known as the Federal Farm Loan Act," in Iowa and Minnesota. Loans were only permitted on lands for agricultural purposes, not to exceed fifty per cent of appraised value of security, to be determined by Federal appraiser. Between 70 and 80 per cent of the loans were in

Iowa and 30 per cent in Minnesota. Bonds were issued by the government in lieu of mortgages deposited with the registrar. In four years about $1,600,000 were issued. The bonds were sold to a syndicate and the bank had the funds for reinvestment. Interest was due semi-annually and the loan matures and liquidates in thirty-three years by payment of semi-annual installments.

No mortgages were sold on the open market. No banks in Des Moines were making this type of loan. (R. 312-317.)

FIRST AND SECOND MORTGAGE CORPORATION.
(Tr. 882-896 and 906-914.)

The secretary testified this corporation had the same officers and stockholders as the Des Moines Joint Stock Land Bank though not entirely identical. It was in the brokerage business, bought and sold farm loans, developed city additions and dealt in city property and represented eastern banking houses in the purchase of school bond issues.

The company's stockholders were many country banking institutions through their officers and applications for farm loans were solicited through these banks, which applications were submitted to the Des Moines, Lincoln and Chicago Joint Stock Land Banks, Central Life Insurance Company and Illinois Merchants Trust Company, taking care of all the details as to the execution of the papers and title to the mortgaged land.

In the insurance loans the borrower paid a commission and in the land bank loans the bank paid the commission. The loans were first mortgages. The insurance loans were five, seven and ten year notes.

The company bought a Le Mars Gravel Company bond issue for investment but gave company stock for them. No investment certificates were issued. The company held many stock notes. It did not loan its own money.

All second mortgages were in settlement of purchase of stock in the company. (R. 312-317.)

CONTINENTAL MORTGAGE AND LOAN CO.
(Tr. 1022-1052.)

The secretary of the corporation testified that it was organized in 1919 and did business in the years 1920, 1921 and 1922. Its business was principally automobile financing and some other investments were bought.

The automobile financing was where the dealer sold an automobile, new or second hand, with an unpaid balance of the purchase price, which balance was evidenced by a note and mortgage on the car, six or twelve month's paper. These were purchased by the corporation at a discount. The note bore interest after maturity. The company borrowed money from banks by depositing the collateral as security. Some collateral trust notes were issued also. Possibly a gross of $100,000 business in one year was done. The company would buy any paper it thought sound and profitable but the major business was automobile financing. Only one or two real estate loans were made, except where arrangement for the sale was made before the deal was closed. No Des Moines bank, so far as known, was loaning on any second hand automobiles. (R. 336-340.)

DES MOINES DISCOUNT COMPANY.
(Tr. 1053-1062.)

The secretary-treasurer of this company testified as to the years 1921 and 1922. The company bought notes and in two or three instances bought automobile contracts or loaned money for the purposes of buying automobiles. The notes were all held until maturity. They averaged a year as to maturity. Money was borrowed of the local banks, and no

complaint was ever made that they were in competition. Collateral was always taken for loans. The company handled a class of business the banks would not handle, (R. 342) and the security was of a different type (R. 341-342).

BANKERS MORTGAGE COMPANY.
(Tr. 1063-1086.)

The vice-president and sales manager testified he was with the corporation from July, 1918, to January, 1920. The company dealt largely in farm mortgages, municipal bonds, corporation bonds, industrial and public utility bonds and a few city mortgages, but not many, almost wholly in Iowa. Customers or prospects were produced by the stockholders and bankers.

Loans were first mortgage real estate loans.

Municipal, county and school bond issues were bought. These were resold to any buyer found.

In 1919 all the business done was approximately $1,000,000.

Liberty bonds were bought and sold, as well as railroad bonds and a few foreign bonds. Debenture bonds were issued. These were secured by mortgages deposited with a trustee. No special assessment bonds were dealt in. The witness was not listed as a stockholder of the company in 1918 or 1919 though he claims to be vice-president.

The company got the loans the bank did not want to make. (R. 343-347.)

UNITED MORTGAGE LOAN COMPANY.
(Tr. 1099-1103.)

The president testified this company is a corporation. It made real estate loans, bought contracts. The loans were on Des Moines real estate, first or second mortgages, but mostly

second mortgages. They were generally one year or more. Real estate contracts were also taken as security as collateral to loans. The items $5,979.17 in Assessment Roll of January 1, 1919, Exhibit "1394", were first and second mortgages, the same as to item $5,699 January 1, 1920, Exhibit "1395", $4,544.00, January 1, 1921, Exhibit "1396", and $3,700.50 January 1, 1922, Exhibit "1397".

Some loans were sold to individuals and when sold the money was used to pay debts or buy other securities. The company catered to the risky business with stiffer loans and more profit. (R. 349-353.)

MERCHANTS LOAN & INVESTMENT COMPANY.
(Tr. 1103-1128.)

The vice-president testified the company bought contracts and loaned money on real estate security occasionally on other collateral, but not as a rule. It was a first and second loan business but considerable of a second loan business. Some loans were sold to individual investors in Des Moines. A very limited amount of loans were made on collateral as liberty bonds or stock. Most real estate loans were on Des Moines property while some were on farms in Dallas and Polk Counties. The company turnover during the years was from 50 to 100 thousand dollars.

The business consisted in the making the loans and either holding them for payment or reinvesting of the proceeds. The company is now liquidated.

The real estate contracts bought were where real estate had been sold on a small payment down and the balance to be paid in installments. There was usually a first mortgage on the property creating a liability of "Bills Payable". Contracts were purchased at a substantial discount and ran a number of years. Stockholders in the Central State Bank, Mechanics Savings Bank, Des Moines National Bank, Central

Trust Company, Valley National Bank and Peoples Savings Bank were stockholders in the company.

It was organized in 1920. The loans were mostly second mortgages and the first mortgages were "stiff" and over fifty per cent of value. The company catered to the business that took more risk and more profit. No deposits were received. Its deposit account was kept in the Central State Bank. Money was borrowed from the Central Trust Company or Central State Bank on collateral. (R. 350-353.)

STATE BOND COMPANY.
(Tr. 1205-1213.)

Ross, an officer (?), testified over objection how the company was doing business prior to his connection with it. He stated the company was organized to sell savings bonds in the city and state. The payments for the bonds were made monthly and the money was invested in first mortgages and deposited with the Auditor of State. The bonds were twenty year bonds with part of them having a settlement privilege after ten years, but the amount he did not know.

The Capitol Hill Bank had issued participating bonds which were taken over by the company upon organization. It was organized by the owner of the bank. What participating meant, he did not know.

The real estate loans were either made direct or purchased from the Capitol Hill Bank. (R. 366-368.)

POLK COUNTY MORTGAGE COMPANY.
(Tr. 1349-1363.)

The president of the company testified: The company confined its business to Polk County. It was in the "subdivision business" and only made loans incidentally. In rare instances was a loan made and disposed of for a com-

mission. Never was a loan bought and loans were made as a rule only incidental to the sale or subdivision of property. Loans were made to promote the sale of property and the note was usually to the company. The mortgages were usually first mortgages. The money was usually money belonging to the president's relatives. Some loans were made in connection with real estate transactions for the purpose of enabling the buyer to pay off obligations accrued against the property. They were advances. Some Liberty bonds were taken on payment of property. Real estate was the principal business, that is, buying a tract of land and then subdivide them and sell the lots, usually on monthly payment contracts. All loans made were only incidental. (R. 391-394.)

CORN BELT LAND & LOAN COMPANY.
(Tr. 1409-1417.)

A stockholder, a brother of the president, but otherwise we find nothing to call him "chief", testified, he was familiar with the business "in a general way". The company was in the general real estate loan business, buying lands, borrowing money and making loans for other people, "that is all". It was the general rule of the company to have applications made for loans and after some one has inquired for a loan, have a man or men go to various places and seek the money, and after the company "was sure" it could get the money, the transaction would be closed and the loan made. Most security was real estate, but some were chattel loans. The loans read largely to the person taking them over. Some money was received from insurance companies but the company was not the official representative. Some loans were made to the company where it borrowed the money from the insurance company. It was very seldom the company sold a loan.

The witness lived in Illinois in 1919 and 1920 and had

very little to do with the company except reports and letters were sent him. The president, since deceased, stated the company had none but purchase price mortgages in 1919 and the witness says that is correct.

The company was not in the business of buying and selling short time paper and took no deposits. (R. 400-401.)

GUARANTEE MORTGAGE & FINANCE CO.
(Tr. 3307.)

The president of the company testified, it was a corporation under the laws of Iowa, beginning business when it was incorporated in 1918, but its organization was not completed until 1919. It was an investment company and bought and sold securities and dealt in farm lands and securities. It handled both first and second mortgages. In cases, it made loans direct to the borrowers, mostly in Iowa. Most of the loans were farm loans and only one or two pieces were done on city mortgages and that was in Des Moines. The company issued debenture bonds. As an example, $120,000.00 of mortgages would be taken and deposited in trust and against them $100,000.00 of collateral or debenture bonds issued. These were an obligation of the company. They were sold in Iowa and bore interest. They ran for five years. The first issue was for $100 000.00 and $80,000.00 of them were sold. The second issue was $100,000.00 and $29,000.00 of those were sold. There were some collateral loans but as a matter of business the loans were only real estate.

The $75,000.00 item in Exhibit "1427" represents stock subscriptions, notes and mortgages. The collateral loan item of $99,000.00 in the tax report of January 1, 1920, were collateral loans made to stockholders, the collateral being the company's stock. The item $213,575.00 liabilities were mortgages on farms that the company had purchased. The item of assets $989,542.06 in the statement of 1920, is certificate

of deposit $157,903.00; liberty bonds $191,050.00; mortgage notes $533,700.00; and collateral notes $99,563.60; stocks purchased $7,325.00.

The item in January, 1921, tax statement assets $1,222,931.00. This represented liberty bonds $151,450.00; and collateral notes $299,279.00 which had been originally stock subscription notes but now were stock collateral notes and a secured note of $4,353.00 and a commisison note of $600.00.

In January, 1922, the asset item of $1,443,127.00 was made up of $1,101,936.00 mortgages, collateral notes $311,488.00, and notes receivable $24,000.00; certificate of deposit $5,000.00, and a commission note of $480.00; stocks purchased were $34,767.00 and bonds $12,360.00.

January 1, 1921, the company owed the Peoples Savings Bank, Des Moines, Iowa, $35,000.00, the Des Moines National Bank $25,000.00, and the Mechanics Savings Bank $25,000.00, and a Chicago National Bank $90,000.00. In January 1, 1922, the company owed the Peoples Savings Bank $15,000.00, Des Moines National $25,000.00, Slater Savings Bank $2,052.00, and $195,055.00 for farm mortgages, and $59,500.00 on deferred lease payments. (R. 616-619.)

NATIONAL INVESTMENT & FINANCE CO.
BURNS BROS. COMPANY.
BURNS BROS., INCORP.
(Tr. 4367-4375.)

The secretary states the Burns Bros. Company was a corporation, with its principal place of business in Des Moines. The witness first became associated with the company in September, 1921, and the witness to that time had not been interested in the Burns Bros. Company or the National Investment & Finance Company. He was elected secretary in January, 1922, and prior to that time only a stockholder. In 1921 and 1922 the company conducted an insurance depart-

ment and also had money invested in real estate mortgages and they did not handle issues of bonds or hold any. The witness thinks they dealt in mortgages and owned some farm mortgages, but they did not hold any collateral loans or mortgages upon live stock or anything of that sort.

Exhibit "1422", being the tax statement of 1922, showing the item $318,556.00 represents stock purchased in the company. The last $100,000.00 of it was for money owing on stock. The other $200,000.00 the witness does not know what it represents.

Miss Hamilton, (Tr. 1193-1204) the witness, testified that she was with the Burns Bros. Company beginning January, 1921, when it came into existence. It took over the business of the National Investment & Finance Company, the name being changed in 1921. The witness was also employed by the National Investment & Finance Company. She was a stenographer until 1921 or 1922 and then auditor for the company.

Witness stated that her memory was not clear on the business prior to the Burns Brothers Company but that she knows livestock loans were talked about and only a very, very few were made. Some mortgages were made on farm property located in Iowa. The company handled some large blocks of municipal or school district bonds. They did not handle paving bonds or street improvement bonds. They did buy and sell some mortgages but only a few were sold and many were held.

For some loans collateral such as stocks and bonds were taken.

The Burns Bros. Incorporated was not turned into the Burns Bros. Company. It remained separate and was liquidated.

Burns Bros. Company borrowed from the Des Moines National and Iowa National Banks in Des Moines. (R. 743-747.)

THE BANKING BUSINESS OF PETITIONER.

Petitioner's statement as to the Banking Business of Petitioner is fairly accurate but not complete. Without reiteration, we add:

Petitioner did not make loans direct on real estate mortgages. (R. 486.) It purchased from and held for insurance companies real estate mortgages until such time as they had funds available to repurchase them. (R. 486.) They were carried with bills receivable. (R. 486.)" A good many of these were regular mortgage loans running for a five year period, but our arrangement would be to carry them for thirty, sixty, ninety days, or six months. It was a purchase and we carried the papers endorsed and assigned to us, but with the general agreement that they (correspondent bank) were to sell them to other people". (R. 487.) It, in this manner, carried $760,000.00 of loans from the Banker's Life Company, but could not have made a direct loan that size, (R. 489) and carried loans to an excess of 25% of their capital and surplus. (R. 489.)

The bank did not buy any conditional sales contract, payable and running over a year, representing the sale of new and used automobiles. It was not the general practice to handle such paper. (R. 496.) All the automobile dealings of the Bank were with the dealers. Money was loaned the dealers on their own notes (R. 494.) The bank did not loan money to automobile companies, taking as collateral security conditional sales contracts payable in monthly or other installments. (R. 496.)

While the Bank loaned money to farmers who were cattle raisers, it did not loan money secured by direct mortgage on the cattle. (R. 501.) The Bank purchased by discounting notes secured by chattel mortgages covering cattle, but the paper was endorsed by the original lender. (R. 502.) In connection with cattle paper, it was a more desirable in-

vestment for the Iowa National Bank to loan its money to country banks with good collateral, taking the endorsement of the borrower, than it would have been to make numerous direct loans to the farmer. (R. 503.)

The bank made no loans on second mortgages on real estate. (R. 505.)

The bank made no small loans secured by chattel mortgages on furniture, nor assignment of wages. (R. 508.)

The bank did not finance public improvement contractors by taking the improvement certificates or bonds as payment, but took notes secured by assignments of the contract and guaranteed by bond. (R. 522.)

SUMMARY OF ARGUMENT.

I.

Under the pleadings and the facts as shown in the record, appellants can not maintain an action in madamus.

(a) Claims for refund of taxes erroneously or illegally exacted must be presented to the Board of Supervisors.

Bibbins v. Clark & Co., et al., 90 Iowa, 230.
Brownly v. Marion Co., 53 Iowa, 487.
Dickey v. Polk County, 58 Iowa, 287.
Richards v. Wapello Co., 48 Iowa, 507.

(b) The Board of Supervisors shall direct the County Treasurer to refund taxes *found* to have been erroneously and illegally exacted and paid.

Section 7235, Code of 1927.
Section 1417, Code of 1897.

(c) An erroneous assessment is one made when officers have power to act but err in the exercise of the power. An illegal assessment is one where they have no power to act at all.

Ford v. McGregor, 23 Pac., 508 (Nev.).
Griswold v. Calhoun Co., 198 Ia. 1240.

(d) The Board of Supervisors must ascertain whether the taxpayer is entitled to be reimbursed.

Section 1417, Code of 1897.
Section 7235, Code of 1927.
Bank v. Board of Supervisors, 168 Iowa, 501.

(e) The plaintiffs had filed their claims for refund with the Board of Supervisors and such Board had ascertained that their claims should be denied. (Printed Record page 557, line 32, and page 558, lines 1 to 12, inclusive.)

(f) An action of mandamus will lie to compel an inferior tribunal, board, or corporation to do or not to do an act.

Section 12440, Code of 1924.

(g) The action of mandamus will not issue to control discretion.

Section 12441, Code of 1924.

(h) There is a great difference between discretionary acts and ministerial acts:

(1) A ministerial act is one that one performs without regard to his own judgment on the propriety of the act being done.

(2) A discretionary act is one that involves the exercise of judgment based upon facts to be found.

Ferris on Extraordinary Legal Remedies, Section 206.

Clark v. Board of Directors, 24 Iowa, 266.

Preston v. Board of Education, 124 Iowa, 355.

Griebel v. Board of Supervisors, 202 N. W., 379, 200 Iowa 143.

Riley v. City of Des Moines, et al., 212 N. W., 716, 203 Iowa 1240.

Sarby v. Morey, 221 N. W., 492, 207 Iowa, 521.

(i) Before the Board of Supervisors would have been justified in directing the County Treasurer to make refund upon plaintiff's claims they would have to find from the facts adduced:

(1) That other moneyed capital in competition with banks had been assessed at a different rate than shares of bank stock.

(2) That a relatively material amount of moneyed capital was so used.

(j) Under the provisions of Section 7235 of the Code of 1927 and 1417, Code of 1897, the Board of Supervisors not only are required to make a finding of facts before ordering

a refund but also act in a *quasi judicial* manner and mandamus will lie to compel them to act but not to control their action.

Ferris on Extraordinary Remedies, Section 283.
High on Extraordinary Remedies, Volume 1, page 50, Section 42 and 43.

(k) The abatement or reduction of taxes improperly assessed is a judicial rather than a ministerial act.

High on Extraordinary Remedies, Vol. 1, page 158, Sec. 141.

(l) The writ of mandamus can not be used as a means of appeal or as a writ of error.

Ferris on Extraordinary Legal Remedies, Sec. 191-299.
Interstate Commerce Commission, Plaintiff in Error v. Merchants Ass'n of New York, 67 Law Ed., 112.
Woodbury Co. v. Talley, 147 Iowa, 498.

(m) The decision of the Board of Supervisors in denying the refund can not be attacked collaterally.

Scripture v. Burns, et al., 59 Iowa, 70.
Sullivan v. Robbins, 109 Iowa, 235.
Collins v. Board of Supervisors, 158 Iowa, 322.
Littell v. Webster County, 152 Iowa, 206.

(n) Mandamus will not lie to compel the payment of money by public officers if there is no fund out of which it legally can be paid and the burden is on the plaintiff to allege and prove the existence of the fund.

Woodcock v. Board of Education, 10 A. L. R., 181.
Iowa Ry. Land Co. v. Woodbury Co., 64 Iowa, 212.
38 Corpus Juris, page 770, Section 412.
Rice v. Walker, 44 Iowa, 458.
Section 12452, Code of 1927.
Farson v. Baird, 63 Law Ed., 233.

(o) Plaintiff can not maintain this action because the necessary parties are not before the court.

State, ex rel., Volunteer Relief Ass'n of Wilmington v. Mayor and City Council of Wilmington, et al., 118 Atlantic, 640 (Del.).

Rankin v. Noel, County Commissioner, et al., 185 S. W., 883 (Tex.).

(p) Plaintiffs' remedy, if any, as to the action of the Board of Supervisors, is at law.

Section 12456, Code of 1927.

Gaffney v. Young, 200 Iowa, 1030.

Riley v. City of Des Moines, 212 N. W., 716, 203 Iowa, 1240.

Home Savings & Trust Co. v. District Court, 121 Iowa, 1.

Jewett v. Ayres, 167 Iowa, 431.

Woodbury Co. v. Talley, 147 Iowa, 498.

And other cases cited in Brief.

II.

(a) Appellants' remedy was by appeal from the local Board of Review.

Iowa National Bank v. J. M. Stewart, 232 N. W. 445 (Iowa).

Griswold Land & Credit Co. v. Calhoun Co., 198 Iowa, 1240.

First National Bank v. Board of Review, 199 Iowa, 1124.

First National Bank of Newton v. Board of Review, 204 N. W., 223, 200 Iowa, 131.

Lamont Savings Bank v. Luther, 200 Iowa, 180.

First National Bank of Montezuma v. Board of Review, et al., 201 N. W., 769, 199 Iowa 1124.

Nelson v. First National Bank, 42 F. (2d) 30, (C. C. A. 8th.).

(b) When the laws of a state create a tribunal for the correction and equalization of assessments and provide that persons aggrieved may apply to such board for the correction of errors, and confer upon the board powers so to do, it is for the Suprme Court of the state to determine whether the remedy is exclusive, and its action in that respect raises no federal question.

Railway Company v. Patterson, 154 U. S. 130, 14 S. Ct. 977.
First National Bank v. Anderson, 269 U. S. 341, 346.

(c) The decisions of the highest court of a state are conclusive on the federal courts in fixing the power, duties and authority of revenue collecting officers.

Hendrickson v. Apperson, 245 U. S. 105, 38 S. Ct. 44, 62 L. ed. 178.
Hendrickson v. Creager, 245 U. S. 115, 38 S. Ct. 46, 62 L. ed. 185.

III.

The acts of the taxing officers in these cases, even if erroneous or illegal, fall far short of being "the deliberate, intentional and willful acts" such as might constitute a violation of Sec. 5219—U. S. Rev. Stat.

Davenport Nat'l. Bank v. Board, 64 Iowa, 140-3.
Jenkins v. Neff, 46 (U. S.) L. Ed., 1140.

IV.

Where the state law itself is admitted to be not in violation of Section 5219, but it is claimed that the erroneous *administration* of the law is in contravention of Section 5219, then the moneyed capital, as to which complaint is made, must be moneyed capital in competition with the individual bank complaining, and not moneyed capital which might

be in competition with some other bank under same circumstances. And in any event, it must be moneyed capital in a material or substantial amount in competition with some material branch or substantial part of the ordinary and legitimate banking business which is actually being performed by the complaining bank.

Davenport Nat'l. Bk. v. Board, 123 U. S., 83.
Georgetown Nat'l. Bk. v. McFarland, 273 U. S., 568; 47 (U. S.) Sup. Ct. Rep., 467.
First Nat'l. Bk. Guthrie Center v. Anderson, 196 Iowa, 587.
Manning Bank v. Armstrong, 211 N. W., 485-7, 204 Iowa, 512.
Head v. Board, 170 Iowa, 300.
First Nat'l. Bk. Montezuma v. Board, 199 Iowa, 1124-34.
First Nat'l Bk. v. Anderson, 192 N. W. 6, 196 Iowa, 587.
Mercantile Nat'l. Bk. v. N. Y., 121 U. S,, 138.
Aberdeen Bk. v. Chehalis, 166 U. S., 440.
First Nat'l Bk. Newton v. Board, 204 N. W., 223, 200 Iowa, 131.
Jasper Co. Sav. Bk. v. Board, 202 N. W., 387 (Iowa).
Poweshiek Sav. Bk. v. Johnston, 202 N. W., 384, 199 Iowa, 555.
Des Moines Nat'l. Bk. v. Fairweather, 68 (U. S.) L. Ed., 190.
First Nat'l. Bk. v. Anderson, 70 (U. S.) L. Ed., 171.
Mercantile Nat'l. Bk. v. Hubbard, 98 Fed., 465.
People ex rel. v. Goldfogle, et al., 205 N. Y. S., 870.
Affirmed on appeal, 211 N. Y. S., 85.
Affirmed on appeal, 152 N. E., 418 to 420.

A bank cannot buy and sell stocks and bonds of other corporations, or deal in them on commission.

Vol. 1, Morse on Banks & Banking (5th Ed.), Sec. 59, note 4.
People ex rel. v. Peabody, et al., 211 N. Y. S., 114.

National banks cannot exercise any powers not expressly granted or necessarily incidental to those granted. They cannot deal in stocks of other corporations.

California Bank v. Kennedy, 167 U. S., 362.

It must be competition with actual transactions carried on by the bank complaining, not merely in competition with something the bank might do.

People ex rel. v. Goldfogle, 151 N. E., 452 (N. Y.).

National banks cannot lawfully sell and deal in farm mortgages for a commission.

Farmers Mer. Nat'l. Bk. v. Smith, (C. C. A.) 77 Fed., 129-36.

Short time chattel loan companies are not in competition with national banks.

Welfare Loan Society v. Des Moines, 219 N. W., 534, 205 Iowa 1400.

Universal Loan Corp. v. Board of Review, 219 N. W., 536, 205 Iowa 1391.

V.

The corporations who were taxed on their moneys and credits could not constitute competition with National Banks contrary to Sec. 5219, because that statute provides that it must be the "moneyed capital in the hands of individual citizens" that must be taxed the same as National Banks. These corporations are not "individual citizens".

Davenport Nat. Bank v. Board, 123 U. S., 83.
People v. Doty, 80 N. Y., 225-8.
Perkins v. Smith, 23 N. E., 21-3 (N. Y.).
Prim v. Fort, 57 S. W. 972 (Tex.).
Prim v. Fort, 57 S. W. 86 (Tex.).
First Nat. Bank of Aberdeen v. Chehalis, 166 U. S. 440.

Bank v. Chapman, 173 U. S. 205.
Mercantile Bank v. New York, 121 U. S. 138.
Perkins v. Smith, 23 N. E. 21-3 (N. Y.).
People v. Doty, 80 N. Y. 225-8.

VI.

As National Banks were restricted as to the character and locality of the real estate loans they could make, it was necessary to show, in order to establish competition, that the loans made by the individuals and corporations complained of, were the class of loans that could have been made by a National Bank. This, in most cases was not done.

First Nat'l. Bank v. Hartford, 47 Sup. Ct. Rep., 462.
First Nat'l. Bank v. Anderson, 192 N. W. 6, 196 Iowa 587.
Merchants Nat'l Bk. v. Richmond, 256 U. S., 635.
First Nat'l Bank, Montezuma, v. Board, 201 N. W., 769, 199 Iowa 1124.

VII.

There is no such discrimination shown between the taxation of the State Banks and other corporations and individuals as to constitute a violation of either the State or Federal Constitution. The State Banks are creatures of the state and have only such rights as are granted by the State.

Layman v. Telephone Co., 123 Iowa, 591-600.
U. S. Express Co. v. Ellyson, 28 Iowa, 370-7.
Hawkeye Ins. Co. v. French, 109 Iowa, 585-9-90.
Primghar State Bank v. Rerick, 96 Iowa, 238-42-4.
First Nat'l. Bank v. Council Bluffs, 182 Iowa, 107-120.
Des Moines Nat'l Bank v. Fairweather, 191 Iowa, 1240.
Langhart v. First Nat'l Bank, 191 Iowa, 957.
Waterloo Trans. Co. v. Supervisors, 131 Iowa, 237-43.

Iowa Mut. Tor. Ins. Assn. v. Gilbertson, 129 Iowa, 658-67.
Bells Gap R. R. v. Commonwealth, 134 U. S., 232.
Chester v. Penn, 134 U. S., 240.
Home Ins. Co. v. N. Y., 134 U. S., 594.
Pac. Ex. Co. v. Seibert, 142 U. S., 339.
Charlotte Ry. Co. v. Gibbs, 142 U. S., 386.
Jennings v. Coal R. Imp. Co., 147 U. S., 147.
Giozza v. Tierman, 148 U. S., 657.
Warren v. Henly, 31 Iowa, 31.
First Nat'l Bk. of Montezuma v. Board, 201 N. W., 769, 199 Iowa 1124.

VIII.

In no event could the erroneous or even illegal individual acts of the taxing officials or some of them become a violation of the Constitution as it could be reviewed and relief obtained by certiorari. The Auditor could have corrected the error but appellants did not ask him to.

First Nat'l. Bank v. Weber, 196 Iowa 1155.
Sec. 7149—Code of Iowa, 1924.

The Auditor might have been compelled to correct the errors by mandamus.

Ridley v. Doughty, 77 Iowa, 226.
Ridley v. Doughty, 85 Iowa, 418.
First Nat'l. Bank v. Hayes, 186 Iowa, 892-4.

The unauthorized act of an official especially where it is expressly contrary to the state law does not raise a constitutional question or a federal question under the Constitution.

Barney v. City of New York, 193 U. S., 430-8.
Ft. Madison Sec. Co. v. Maxwell, 202 Iowa, 1346.

IX.

The previous appeals from the Board of Review taken by the banks as to these very assessments, and the suits brought in Federal Court by some of them and later dismissed, constituted adjudications. They either did raise, or could have raised in these prior appeals and suits, all of the objections they are now making.

Pierce v. Nat'l Bank of Commerce, 268 Fed., 487.
Taylor v. Taylor, 240 S. W., 6 (Ark.).
Cressler v. Brown, 192 Pac., 417 (Okla.).
Reinkey v. Wilkins, 179 N. W., 751 (Wis.).
Eder v. Fink, 180 N. W., 542 (Minn.).
Village of Winnetka v. Handy, 128 N. E., 805 (Ill.).
Blondel v. Woodbury Co., 212 N. W., 335, 203 Iowa 1099.

X.

The taxes complained of, it is admitted, were not illegal but at most only erroneous. In such case if payment is made it cannot be recovered back unless it was paid under protest. And such protest must point out the very matters complained of. This was not done in these cases.

S. Dak. Sec. N. Bk. v. Twinde, 217 N. W., 542 (S. Dak.).
Hawkeye Co. v. Marian, 110 Iowa, 468.

Nor can interest and penalties be remitted.

Lamont Sav. Bank v. Luther, 200 Iowa, 180.

XI.

The banks, both national and state, were all guilty of laches and are by their acts and omissions estopped to make the claims they are now making. They made no protests for years against the taxing officers assessing their alleged

rivals on the 5 mill basis; they never asked the Auditor to correct the error as he had power to do; they never appealed from the erroneous action of the Board of Review as to their rivals; they appealed as to their assessments but did not raise the present questions; they allowed the taxes paid by them to be distributed to the various taxing bodies without protest or objection; they signed the assessment rolls and agreed to pay the taxes without any objection to the method of assessment, except as to including U. S. bonds; some of them brought suits raising the very questions now raised and then dismissed them and paid the taxes; many of the individual competitors complained of were stockholders in one or more of the banks, and many of the stockholders and officers of the corporation competitors were also stockholders and officers in the banks.

Slimmer v. Chickasaw Co., 140 Iowa, 448-53.
Farmers Ins. Co. v. Linn Co., 202 Iowa, 444.
Sec. 7149, Code of Iowa, 1924.
Fiman v. Hughes Co., (S. D.), 225 N. W., 711.

XII.

The plaintiff banks have not come into equity with clean hands. They have systematically assisted their customers in evading taxation. They have combined together unlawfully to decrease the rate of interest charged by them and to make a charge for carrying small accounts.

13 Corp. Juris, page 444, Par. 381.

XIII.

The banks cannot maintain these suits as they are not the real parties in interest. If any one was improperly taxed it was the stockholders, and not the banks, and the stockholders are the only ones entitled to the refund. The banks have no right to represent them. Many who were

stockholders when these taxes were levied and were paid by them, are no longer stockholders of these banks. There is a defect in parties plaintiff.

37 Cyc., 1187.
Board v. First Nat'l Bank, 57 N. E., 728 (Ind.)
First Nat'l Bank v. Patterson, 176 Pac., 498 (Colo.).
Primghar Bank v. Rerick, 96 Iowa, 238-42-4.
Head v. Board, 170 Iowa, 300-5-6.
First Nat'l Bank v. Council Bluffs, 182 Iowa, 107-14.
Andrew, Supt. v. Munn, Treas., 218 N. W., 526, 205 Iowa, 723.
Stickney v. Bangar, 30 Me., 404.
Fiman v. Hughes, (S. D.) 225 N. W., 711.
Farmers Nat'l Bank v. Hoffman, 93 Iowa, 119-22-4-5.
Sec. 7235 of Code of Iowa, 1924.

Where a bank pays out of its assets the taxes on shares of stock held by the stockholder, such action amounts to the declaration of a dividend.

Redhead v. Iowa Nat'l Bank, 127 Iowa, 572.
In re Feliciana Bk. & Trust Co., (La.) 78 So., 169.
Stapylton v. Haggard, 91 Fla., 93.
Hershire v. First Nat'l Bank, 35 Iowa, 272.

XIV.

There was no discrimination as against the banks in any event, because a five mill levy properly applied to the moneys and credits held by the banks would have exceeded the tax complained of.

Sec. 6992, Code of Iowa, 1924.

XV.

The actions are barred by the Statute of Limitations.

Subdiv. 4 of Sec. 11007 of Code of 1924.
Murphy v. Supervisors, 215 N. W., 744, 205 Iowa 256.

XVI.

The first year's taxes sought to be recovered are those assessed as of January 1st, 1919, and related to the property acquired and held during 1918. There is no evidence offered as to any competition in 1918, so the banks cannot in any event recover the taxes assessed as of January 1, 1919. For the same reason all evidence of competition during 1922 is irrelevant and immaterial, and cannot be considered.

Iowa Code of 1897, Sec. 1323.
Iowa Code of 1897, Sec. 1359.
Iowa Code Supplement of 1913, Sec. 1366.

XVII.

The petitioners have not exhausted their remedy before the Supreme Court of Iowa. This record shows the petitioners have filed a notice of intention to file a petition for rehearing in said court, the Supreme Court of Iowa on said petition having authority to grant a rehearing and to determine the case favorably to petitioners' contention.

Sections 12880-12882, inclusive, Code of Iowa, 1927.

XVIII.

A decree and judgment of the Supreme Court of Iowa does not become final and enforceable until the procedendo is sent down from the Supreme Court to the lower court, and until this is done there is not a final decree from which the petitioners herein can petition for certiorari to this honorable court, as required by Section 237, Judicial Code as amended. The procedendo has not been sent down in this case.

Sections 12875, 12876, Code of Iowa, 1927.

Rule No. 37, Supreme Court of Iowa, is as follows:

"No procedendo shall issue in any case until the expiration of thirty days from the filing of the opinion, except upon an order of the court, or a judge thereof, upon cause shown, and except in criminal cases and cases where petitions for rehearing have been overruled."

Chicago Great Western R. R. Co. v. Basham, 249 U. S. 164.

Andrews v. Virginian Ry. Co., 248 U. S. 272.

Citizens Bank v. Opperman, 249 U. S. 448.

Ohio River Company v. Fisher, 115 Fed. (C. C. A.) 929.

ARGUMENT.

PROPOSITION I.

Mandamus Was Not the Proper Remedy.

Petitioner Banks filed their claim with the Board of Supervisors of Polk County asking for a refund of the taxes complained of, and although the Board of Supervisors had a number of regular sessions and a great number of special sessions, the testimony and record shows that the Banks at no time appeared before such Board and offered any testimony.

Sometime after the claims were filed petitioners brought an action of mandamus in the District Court of Polk County asking that a writ of mandamus issue to compel the Board of Supervisors to order the County Treasurer to refund the sums claimed to have been illegally or erroneously exacted. Among other things the respondents plead that the Board of Supervisors had acted upon the matter and had denied the claims and that mandamus was not the proper remedy. Before the testimony had shown that the Board of Supervisors had acted upon petitioners' claims, and in fact at the very outset of the trial, counsel for the respondents raised the question that the only evidence material in the trial of the case was such as to show that the Board of Supervisors refused to act upon plaintiff's claim, and by stipulation this objection was to stand without repetition. After petitioner had shown by the records of the Board of Supervisors that the Board had acted upon the claims of the Banks, the right of the petitioners to maintain their action in mandamus was again challenged, respondent challenged the propriety of the action of mandamus and moved the Court to transfer to law on the theory that petitioners were seeking a money judgment.

Having called the Court's attention to a few excerpts from the record we now inquire whether or not the action of mandamus will obtain as against the Board of Supervisors. And in discussing this question, while we have heretofore set out our brief points in subdivisions, the cases as we view them are all so closely related that they will be considered more or less as a whole.

ARGUMENT ON PROPOSITION I.

As has heretofore been pointed out, petitioners filed a verified claim for the sums sought to be recovered in this action with the Board of Supervisors, and the Board of Supervisors acted upon said claim and disallowed the same, and petitioners then sought by way of a writ of mandamus to compel the Board of Supervisors to undo the action already taken by the Board and direct the treasurer to make a refund of the amounts claimed by petitioners.

There can be no controversy but that it is necessary that petitions for the refund of taxes claimed to be illegally and erroneously exacted, must be presented to the Board of Supervisors and the cases cited in subdivision "a" of our brief clearly demonstrates this. It is equally as clear that if petitioners were entitled to recover, the money must come from the particular funds to which it has been distributed.

Inasmuch as the claims were presented to the Board of Supervisors and had by them been disallowed, there being no showing in the record as to what evidence was presented before the Board of Supervisors nor no allegations of fraud as against the Board, it must be presumed that the Board of Supervisors acted fairly and impartially in making their decision.

It is further shown by the record that the money paid by the petitioners to the Treasurer of Polk County was distributed to the various political subdivisions of the County

and of the State in accordance with law. Petitioners contend that by the provisions of Section 7235 of the Code of 1927, Section 1417 of the Code of 1897, they are entitled to maintain a writ and secure an order directing the Board of Supervisors to order the refund of the taxes in the amount claimed by appellants. Section 7235 of the Code of Iowa 1927 reads as follows:

> "Refunding erroneous Tax. The Board of Supervisors shall direct the Treasurer to refund to the taxpayer any tax or portion thereof found to have been erroneously exacted or paid, with all interest and costs actually paid thereon."

From a reading of Section 7235, and it is the same as Section 1417 of the 1897 Code, provision is made for refunding not only erroneous but also illegal tax, and it may not be out of place to call the Court's attention to the distinction between an erroneous and illegal tax. The clearest definition we are able to present and one which has met with uniform favor is the one found in the case of *Ford v. McGregor*, 23 Pac., 508, wherein the court says:

> "There is a distinction between an erroneous and illegal assessment. An erroneous assessment is when the officers have power to act but err in the exercise of the power; and an illegal assessment is where they have no power to act at all."

Applying this definition to the facts as disclosed in this case we must immediately reach the conclusion that the tax is an erroneous one rather than an illegal one, if subject to either such criticism.

It is our contention that Section 7235 as hereinbefore set forth, establishes and makes the Board of Supervisors a special tribunal for the determination of the fact question as to whether the taxes were erroneously exacted. The manifest design of this statute is that the Board of Super-

visors first ascertain whether the taxpayer is entitled to be reimbursed for taxes claimed to be erroneously exacted, and if so that the Treasurer be directed to refund the same from the several funds to which they have passed.

Our own Supreme Court in the case of *Bank v. Board of Supervisors, et al.*, found in 168 Iowa, page 501, in discussing this section which was then Section 1417 of the Code, and no change has been made therein, said:

> "The manifest design of this statute is that the board of supervisors *first* ascertain whether the taxpayer is entitled to be reimbursed for taxes illegally or erroneously exacted and if so, that the treasurer be directed to repay the same from the several funds to which these have passed. Such was the interpretation given in *Iowa Ry. Land Co. v. Woodbury Co.*, 64 Iowa, 212, where recovery against the county was denied, and this decision was followed in *Everly v. Jasper County*, 72 Iowa, 149. It is the duty of the treasurer only to repay from the particular funds into which the taxes have gone and, when necessary, to ascertain by computation the amount to be taken from each. *District Township of Spencer v. District Township of Riverton*, 56 Iowa, 85. The result attained is the restoration of the moneys illegally or erroneously paid by the taxpayer, and each fund continues as though these had never been collected. The remedy is perfect.
>
> "The duty of the board of supervisors is equally explicit. Having *ascertained* that the taxes have been illegally or erroneously exacted or paid, the statute prescribed precisely what shall be done, i. e., the board shall direct the treasurer to refund them to the taxpayer. Such an order is essential to repayment by the treasurer and to enter it, *in a proper case*, is the mandatory duty of the board of supervisors. * * *." (Italics in the above case and following cases are ours.)

You will note that the Court used the word "ascertain" and ascertain means to find.

It occurs to us that the decision of the Court in this respect was a proper one and leaves no question of doubt as

to the meaning of Section 7235, but had not the court passed upon this matter in the case above cited, we think that a reading of the section would lead to no other conclusion without disregarding the proper definition of the word "found".

By the provisions of Section 7235 of the Code of 1927, Section 1417 of the Code of 1897, the Board of Supervisors were constituted and designated by the legislature as a special tribunal for the determination of fact questions involved in the application. We do not believe that it can be successfully contended that this was not the purpose of the legislature in enacting this section, especially is this true when read in the light of the decision above cited.

Yet notwithstanding the fact that the testimony shows that the claims were presented to the Board of Supervisors and by them disallowed, the petitioners then sought in an action of mandamus to review the decision made by the Board of Supervisors and asked the Court to issue an order compelling the Board of Supervisors to enter an order different than the one heretofore entered by them, (Printed Record Page 557, line 31 to page 558, line 12.) This, as we have heretofore suggested, without a showing as to what evidence was presented to the Board of Supervisors, or without an allegation that the Board acted fraudulently or arbitrarily.

It now becomes interesting and important to read the statute which defines one's rights in the extraordinary action of mandamus. Section 12440 of the Code of Iowa 1927 reads as follows:

> "Definition. The action of mandamus is one brought to obtain an order commanding an inferior tribunal, board, corporation, or person to do or not to do an act, the performance or omission of which the law enjoins as a duty resulting from an office, trust or station."

And Section 12441:

> "Discretion, exercise of. Where discretion is left to the inferior tribunal or person, the mandamus can only compel it to act, but can not control such discreion."

Prior to the enactment of the 1924 Code, Section 12440 and 12441 were contained all in one section and were not divided as we now find them, and read as follows:

> "Definition. The action of mandamus is one brought to obtain an order commanding an inferior tribunal, board, corporation or person to do or not to do an act, the performance or omission of which the law enjoins as a duty resulting from an office, trust or station. Where discretion is left to the inferior tribunal or person, the mandamus can only compel it to act, but can not control such discretion. * * *"

From a reading of the statute the natural inquiry presents itself as to what, if any, the difference is between discretionary acts and ministerial acts, and the most concise as well as the universally recognized distinction is best stated in Ferris on Extraordinary Legal Remedies, Section 206, and is as follows:

> "A ministerial act is one which a person performs in a given state of facts and in a prescribed manner, in obedience to the mandate of legal authority, without regard to his own judgment on the propriety of the act being done. The distinction between ministerial and judicial and other official acts is, that where the law prescribed and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment, the act is ministerial, but where the act to be done involves the exercise of discretion or judgment in determining whether the duty exists, it is not to be deemed merely ministerial."

Let us now turn to the decision of the Iowa court and we find that without any discord it has announced the rule

that where the duty imposed involves the exercise of discretion based upon the facts to be found, the same cannot be classed as a ministerial act and mandamus will not lie, however erroneous the conclusion reached.

Clark v. Board of Directors, 24 Iowa, 266.
Preston v. Board of Education, 124 Iowa, 355.
Griebel v. Board of Supervisors, 202 N. W., 379.
Riley v. City of Des Moines, et al., 212 N. W., 716.
Woodbury Co. v. Talley, 147 Iowa, 498.

The rule as stated in the *Preston* case is so clearly stated that we quote therefrom:

> "But where the duty imposed upon the board or tribunal involves an exercise of discretion based upon facts to be found by it, mandamus will not lie, however erroneous the conclusion reached; and upon this all the authorities agree. * * * Without question it was the right of the board in the instant case to determine the question of the residence of the plaintiff as a condition precedent to her admission to the schools as a free pupil. The determination of this question did not depend alone upon the age of the plaintiff. Of necessity other facts were to be considered. Conceding now that the board reached an erroneous conclusion, it is clear that the remedy was by a review of the facts and the judgment predicated thereon."

And in *Milwaukee Malt Extract Co. v. C. R. I. & P. Ry. Co.*, 73 Iowa, 98, our Supreme Court said quoting from High on Extraordinary Remedies:

> "Stated in general terms, the principle is that mandamus will lie to compel the performance of duties purely ministerial in their nature, and so clear and specific that no element of discretion is left in their performance, but that as to all acts or duties, necessarily calling for the exercise of judgment or discretion upon the part of the officer or body at whose hands their performance is required, mandamus will not lie."

And again in the case of *Griebel v. Board of Supervisors*, 200 Iowa, 143, this being an action in mandamus growing out of the power or the act of the board of supervisors in abandoning a portion of a drainage improvement, our Supreme Court in discussing the matter of when the writ of mandamus will obtain says:

> "Where officers have discretion, mandamus will lie to compel them to act, but not to control discretion. *Perry v. Board of Supervisors of Clarke County*, 133 Iowa, 281; *State v. Parker*, 147 Iowa, 69; *Sweitzer v. Fisher*, 172 Iowa, 266."

Section 4341 of the Code of 1897, reads as follows:

> "The action of mandamus is one brought to obtain an order commanding an inferior tribunal, board, corporation or person to do or not to do an act, the performance or omission of which the law enjoins as a duty resulting from an office, trust, or station. Where discretion is left to the inferior tribunal or person, then mandamus can only compel it to act, but cannot control such discretion." (Sections 12440 and 12441 of the Code of 1924).
>
> Under this section, we have repeatedly held that, where a positive official duty is enjoined upon the officer, the remedy of mandamus would lie. *State v. Thomas*, 152 Iowa, 500; *Benjamin v. District Township of Malaka*, 50 Iowa, 648.
>
> *Again, we have held that where the duty imposed involves the exercise of discretion based upon facts to be found by it, mandamus will not lie, however erroneous the conclusions reached. Clark v. Board of Directors*, 24 Iowa, 266; *Preston v. Board of Education*, 124 Iowa, 355.

Thus it is apparent that our courts have held if the act is discretionary, or one that must be determined by a finding of facts mandamus only lies to compel action to be taken, but not to control.

Also in *Woodbury Co. v. Talley*, 147 Iowa, 498 at page 506, the court said:

> "The authority to decide a disputed question implies the exercise of discretion, and this implies the right to decide it for or against the contention of either party. As an abstract proposition, the decision may be wrong, but the wrong is not to be righted by a writ of mandamus. *Meyer v. Dubuque County*, 43 Iowa, 592."

To the same effect is the case of *Charles City v. Ramsey*, 199 Iowa, 722.

Riley v. City of Des Moines, 212 N. W., 716.
Addison v. Loudon, et al., 222 N. W., 406.

The Court in the later case, which is a late Iowa case makes the following statement:

> "The officer (or board) to whom the duty of investigation and power of determination are committed is vested with executive and administrative duties, together with *quasi-judicial* power."

Reading from High on Extraordinary Legal Remedies, Third Edition, Volume One, page 50, Sections 42 and 43, we find the following:

> "Sec. 42. We come next to the consideration of a fundamental rule, underlying the entire jurisdiction by mandamus, and especially applicable in determining the limits to the exercise of the jurisdiction over public officers. That rule is, that in all matters requiring the exercise of official judgment, or resting in the sound discretion of the person to whom a duty is confided by law, mandamus will not lie, either to control the exercise of that discretion, or to determine upon the decision which shall be finally given. And whenever public officers are vested with powers of a discretionary nature as to the performance of any official duty, or in reaching a given result of official action they are required to exercise any degree of judgment, while it is proper by mandamus to set them in motion and to require their action

upon all matters officially intrusted to their judgment and discretion, the courts will in no manner interfere with exercise of their discretion, nor attempt by mandamus to control or dictate the judgment to be given. Indeed, so jealous are the courts of encroaching in any manner upon the discretionary powers of public officers, that if any reasonable doubt exists as to the question of discretion or want of discretion, they will hesitate to interfere, preferring rather to extend the benefit of the doubt in favor of the officer."

"Sec. 43. Illustrations of the rule and of its application are so numerous that it will suffice to indicate only a few of the more important. It will be observed that most of the cases in which the rule has been recognized and applied are cases in which the powers of the officer, as to the act sought to be coerced, were powers of a *quasi judicial* nature. *And when the official duty in question involves the necessity upon the part of the officer of making some investigation, and of examining evidence and forming his judgment thereon, a proper case is presented for the application of the rule.* * * *"

And reading further in the same work, Volume One, page 158, Section 141, we find the rule announced *relative to the refunding of assessments which rule is sustained by the great weight of authority in this State and the United States:*

"While, as has been shown in the preceding section, the writ may properly issue to set in motion officers intrusted with the correction of assessments, and to compel them to act upon an application properly presented, the courts will not interfere with or control the action of such officers when they have actually passed upon the application. The abatement or reduction of taxes improperly assessed, is, in such cases, essentially a judicial rather than a ministerial act. Hence it follows that when the proper officers have passed upon an application for the reduction of taxes, and have decided it adversely to the party aggrieved, they cannot be required by mandamus to alter their decision and to make an abatement in the tax. So when school directors have assessed a school tax, the writ does not lie to compel them to

discharge a taxpayer from payment of his portion of the tax, their power, if any, in this respect being discretionary."

PETITIONERS SOUGHT TO USE THE WRIT OF MANDAMUS AS A MEANS OF APPEAL OR AS A WRIT OF ERROR.

As it seems to us, drawing our conclusions from the cases heretofore cited, the petitioners sought to use the writ of mandamus as a means of appeal, or as a writ of error and we earnestly contend that this is not the province of a writ of mandamus. Ferris on Extraordinary Legal Remedies in discussing the question in Section 191 announces the rule as follows:

> "*Not an Appeal or Writ of Error.*—It may be stated here that mandamus may not be used to perform the functions of an appeal or writ of error and thus be used to review errors of law committed by a tribunal acting within its jurisdiction, however inequitable and inconsistent the ruling may be, whether the order be interlocutory or final."

And again in Section 299, in the same work the rule is announced:

> "*Not an Appeal or Writ of Error.*—Mandamus cannot in any event be used as a substitute for an appeal or writ of error to revise or correct alleged errors committed by a court in the proper exercise of its lawful jurisdiction, however inequitable and inconsistent the ruling may be. Where the law imposes upon a tribunal jurisdiction to pass on issues of fact, if evidence has been wrongfully excluded, or a wrongful conclusion of fact has been reached, and errors of law occur, it results from a mistaken judgment which can only be reviewed and corrected in a proceeding in error. * * *."

From a reading of the last two citations of standard works on Extraordinary Legal Remedies it becomes quite apparent that the writ of mandamus can under no circumstances be used as a writ of error, and the Supreme Court of the United States in the case of *Interstate Commerce Commission, Plaintiff-in-Error v. Merchants Association of New York*, 67 Law Ed., page 112, approved of this rule and laid down without any equivocation the doctrine that mandamus could not be so used.

PETITIONERS SOUGHT TO ATTACK THE DECISION OF THE BOARD OF SUPERVISORS IN A COLLATERAL MANNER.

From the authorities and citations heretofore presented we are confident that the only conclusions that can be arrived at are those for which we contend, and if we are correct in this assumption, then petitioners sought to use the writ of mandamus as an action to attack collaterally the correctness of the decision of the Board of Supervisors in the fact controversy involved. That it was a fact question is so plain and so apparent that we do not deem it necessary to enter into discussion of the facts as presented. As to the use of the writ of mandamus in this manner our Court has passed upon the same in numerous instances. Let us call attention first to the case of *Scripture v. Burns, et al.*, 59 Iowa, 70, where the court says:

> *It is averred in the answer that since the commencement of this suit defendants have at the official meeting of the school board, acted upon plaintiff's written request and refused to comply therewith.* Other allegations of the pleadings need not be recited. The District Court dismissed plaintiff's petition, requiring the defendants to pay all costs except the witnesses attending the term, and refused to hear evidence supporting

the allegations of the petition to the effect that the Catholic creed was taught in the school.

"The decision of the District Court was doubtless based upon the ground that the defendants had acted upon plaintiff's request, and that in this proceeding their action cannot be reviewed, and that as no demand required by Code, Section 3378, was alleged in the petition or shown by plaintiffs requiring them to forbid the teaching of the Catholic creed, the action cannot be maintained as to that branch of the case. The decision of the District Court is correct, and is well supported upon these grounds. *The proceeding by mandamus is intended to compel officers and others to act in the discharge of their duties and trusts imposed upon them. It is not designed to review their action when discretion may be exercised, or when it depends upon facts to be ascertained and determined by them."*

To this same end see *Sullivan v. Robbins,* 109 Iowa, 236.
Collins v. Board of Supervisors, 158 Iowa, 322.
Litell v. Webster County, 152 Iowa, 206.

PETITIONERS CAN NOT MAINTAIN THIS ACTION BECAUSE THE PROPER PARTIES ARE NOT BEFORE THE COURT.

The petitioners in their petition did not name as respondents the necessary parties:

State ex rel., Volunteer Relief Assn. of Wilmington v. Mayor and Council of City of Wilmington, et al., 118 Atlantic, 640.

Mandamus will not issue where it appears it will affect persons not before the court whose rights have not been determined in a previous suit.

Reinking, et al., v. Neol County Commissioners, et al., 185 S. W., 833.

These actions affect the State of Iowa, Polk County, the City of Des Moines and the Independent School District of

the City of Des Moines and none of them are made parties to this action.

PETITIONER'S REMEDY, IF ANY, AT LAW.

The Board of Supervisors having acted upon the matter, petitioner's remedy, if any, is certiorari. Section 12456, Chapter 533 of the 1927 Code, reads as follows:

> "When writ may issue. The writ of certiorari may be granted when authorized by law, and in all cases where an inferior tribunal, board, or officer exercising judicial functions is alleged to have exceeded his proper jurisdiction, or is otherwise acting illegally, and there is no other plain, speedy, and adequate remedy."

So it may be seen from a reading of this section that petitioners' remedy, if any, was by certiorari.

Gaffney v. Young, 200 Iowa, 1030.
Riley v. City of Des Moines, 212 N. W., 716.
Home Savings & Trust Co. v. District Court, 121 Iowa, 1.
Jewett v. Ayres, 167 Iowa, 431.
Woodbury v. Talley, 147 Iowa, 498.

Using the case of *Riley v. City of Des Moines* as an example: This was an action in mandamus brought by the plaintiff against the City of Des Moines, et al., including the Board of Trustees of the pension fund wherein the Board of Trustees of said Pension Fund had denied plaintiff a pension whereupon he brought an action of mandamus to compel the granting of said pension which order was granted by one of the Judges of the District Court of Polk County, Iowa. Our Supreme Court in a discussion of the right to the issuance of the writ of mandamus laid down the rule reversing the District Court of Polk County, Iowa, for issuing the writ, saying:

> "Mandamus issues to compel, while certiorari issues to review, official or judicial acts. Mandamus will not lie where a remedy by certiorari is available."

In the case of *Gaffney v. Young*, 200 Iowa, 1031, another pension matter, the court determined that mandamus was not the proper remedy but certiorari was the sole remedy, stating on page 1032 the rule and quoting from *Home Savings & Trust Co. vs. District Court*, 121 Iowa, page 1, as follows:

> "It seems to be fundamental that, when a new jurisdiction is created by statute, and the court or officer exercising it proceeds in a summary mode, or in a course different from the common law, and a remedy for the revision of its exercise is not given by the statute creating it, certiorari from a court having general superintendence and control over inferior jurisdictions will lie for its revision."

Now comparing the *Gaffney* case with the cases at bar do we not have the same situation, are they not in fact parallel cases? We have the legislature establishing a special tribunal of three to determine whether or not a particular person or persons were entitled to a pension, and the Supreme Court saying that it was a special tribunal established for the determination of the fact question and the remedy was solely one by way of certiorari.

In the case at bar under Section 7235 we have seen that the Board of Supervisors have been constituted as a special tribunal to determine the fact question as to whether or not the taxes were erroneously exacted. Yet, the Board of Supervisors having acted upon petitioners' petition and denied the same, they then come into court and claim by a writ of mandamus that they have the right to review the decision of the Board of Supervisors on the fact question. We contend there is no authority in this state which warrants them in this proceeding.

Before the Board of Supervisors would have been justified in directing the County Treasurer to make refund upon petitioners' claims, they would have to find from the facts adduced that moneyed capital in competition with banks had been assessed at a different rate than shares of bank stock and also that a relative material amount of moneyed capital was so used. It can not in our opinion be successfully contended but that where judgment must be found, based upon facts investigated or adduced the public officers or board in acting upon the same acts in a discretionary manner, and that while mandamus will lie to put the board in motion it will not lie for the purpose of controlling the action to be had.

We contend that the assignment in these cases on these petitioners was not an illegal assessment but at the most was only an erroneous assessment. The burden rested upon the Board of Supervisors to determine the question of fact as to whether or not other moneyed capital in a substantial amount was in competition with the banks.

The case of *Woodbury County v. Talley*, 147 Iowa, 498, to our mind clearly sustains our contention and announces the correct rule of law. In this case the Board of Supervisors employed a tax ferret and a controversy arose between the tax ferret and the Sioux City Stock Yard Company, a corporation, relative to the assessment of the property of the corporation and its shares of stock. It appeared that for the years 1903 to 1907 the assessor treated the corporation as a merchant, and did not list or assess any of the shares of stock either to the corporation or to the individual stockholders. As the Supreme Court in its opinion says "Whether this result was accomplished by [illegible]nent or hypnotism does not appear". The tax ferret called the matter to the attention of the County Treasurer and notice was given the shareholders and a hearing was had. The County Treasurer held that there was nothing left to assess against

the Stock Yards Company or its corporate stock. No attempt was made to obtain a review of the decision of the County Treasurer by certiorari or otherwise. Later an action of mandamus was instituted by the County against the County Treasurer, to the petition of mandamus the County Treasurer filed a demurrer contending among other grounds that plaintiff's petition showed that the defendant County Treasurer had considered and determined the matter. The demurrer was sustained, appeal was taken and this Court in disposing of the case and sustaining the ruling of the lower court, discusses the province of the writ of mandamus, and the language of the Court so clearly states our position in this case that we adopt the same as our argument.

From a reading of the foregoing case can one arrive at any other or different conclusion than that the petitioners' remedy is not by way of mandamus? It can not be said successfully, that the filing of a claim before the Board of Supervisors regardless of what was in the claim, would compel the Board of Supervisors to accept the same as entirely true and if they refuse the claim after an investigation and after a hearing on the facts, that it permits the petitioners or claimant to go in to a court of equity, trying an issue of fact before the court without a jury and thus attempt to reverse the decision of the Board of Supervisors.

Let us assume that the petitioners filed their claim with the Board of Supervisors, and instead of disallowing the claim in its entirety, the Board allowed a part thereof. Could it be said that the claimant could bring an action in mandamus to compel the Board to increase the allowance to the full amount claimed?

Therefore, for all of the foregoing propositions we earnestly contend that petitioners had no right to maintain their action of mandamus under the pleadings and under the facts as disclosed by the record.

MANDAMUS WILL NOT LIE TO COMPEL THE PAYMENT OF MONEY BY PUBLIC OFFICERS IF THERE IS NO FUND OUT OF WHICH IT CAN LEGALLY BE PAID AND THE BURDEN IS UPON APPELLANTS TO ALLEGE AND PROVE THE EXISTENCE OF THE FUND.

Woodcock v. Board of Education, 10 A. L. R., 181, 27 Cyc., 1131.
Iowa Ry. Land Co. v. Woodbury Co., 64 Iowa, 212.

In this case there is no showing made that there is any money on hand for the repayment of the claim of petitioners if the same had been ordered by the court, and Corpus Juris, Vol. 38 at page 770, Section 412 lays down the rule as follows:

> "Mandamus will not issue to compel the payment of a claim against a municipality where no appropriation has been made for such payment, or where there are no funds on hand applicable to the payment of the claim, and funds appropriated for one purpose will not be compelled to be devoted to another."

The undisputed testimony in this case shows that the money paid in has been distributed to the State and subdivisions thereof entitled thereto, and that in making the levies for each year only so much is levied as is necessary for carrying on the governmental expenses, so that if this is a correct rule, before petitioners would have been entitled to recover it would be necessary for them to show that there were funds on hand not appropriated or devoted to any other purpose in a sufficient amount to satisfy their claim if sustained. The Supreme Court of the State of Iowa in the case of *Rice v. Walker*, 44 Iowa, 458, recognized this rule:

> "A writ of mandamus will not issue commanding an officer to do what is not within his power to do. If he

has put it out of his power to do his duty, he may be liable to damages to one prejudiced by his act, but in such case mandamus will not lie."

Then again Section 12452 of the Code among other things provides that the order of mandamus shall be returnable forthwith:

"* * * and no return except that of compliance shall be allowed."

Recognizing the fact that a court will not issue an order that it cannot compel the enforcement of, it seems to us that from a consideration of this section there can be no question but that the burden of proof of showing that these respondents could comply with the order, if issued, was upon the petitioners and this proof they did not meet. The reason for the necessity of this proof and of this showing, it seems to us, is clearly stated in the case of *Farson v. Baird*, 63 Law Ed., 233, where the Supreme Court of the United States said:

"Mandamus would be useless if he did not have funds on hand with which to pay and the courts never do the useless thing of awarding a mandamus which could not be obeyed."

PROPOSITION II.

Remedy is by Appeal.

The Supreme Court of Iowa has held in numerous cases involving questions identical with those in the case at bar that the exclusive remedy of the taxpayer is by appeal to the board of review. It has so held in the case at bar as to the individual assessments and in numerous other cases cited in our brief.

This honorable Court has held in substance that where the laws of the state create a board or tribunal, such as the board of review created by the laws of Iowa, for the correction and equalization of assessments, and provide that the taxpayer aggrieved may apply to such board for the correction of errors, and confer jurisdiction upon the board so to do, that the decision of the Supreme Court of the state determining that the remedy by appeal to such board is exclusive is binding upon this Court, and raises no federal question. *Railway Company v. Patterson*, 154 U. S. 130; 14 S. Ct. 977.

In a case submitted to this Court from the Supreme Court of Iowa, to wit, *First National Bank v. Anderson*, 269 U. S. 341, the question of the taxpayers' remedy was first raised in this Court and was not raised in the Supreme Court of Iowa or the District Court of that state. This Court in the cited case said:

> "The Supreme Court of the state treated the case as cognizable in equity and perceived no obstacle to a consideration of the merits as displayed in the petition. In this that court was proceeding within limits where the state laws and practice were controlling, and its action is not open to revision here."

Thus this honorable Court has recognized that the decision of the Supreme Court of Iowa was final on the question of remedy. Subsequent to the decision of this court in *First National Bank v. Anderson, supra*, the Supreme Court of Iowa has in the cases cited in our brief held that the taxpayers' exclusive remedy is by appeal. Under the decisions of this Honorable Court, to which we have heretofore referred, and as contended in our brief, the decision of the Supreme Court of Iowa on this question in this case is conclusive.

The leading decision of the Supreme Court of Iowa on this proposition is that of *Griswold Land & Credit Company v. Calhoun County*, 198 Iowa, 1240, 201 N. W. 11. The rule announced therein has been repeatedly reaffirmed by the Supreme Court of Iowa down to and including the decision in the case at bar. It is especially to be noted that the remedy which the petitioner in the case at bar contends is not adequate, was followed by not only state banks but national banks by appeal from the board of review. *First National Bank v. Board*, 199 Iowa, 1124, 201 N. W. 769; *First National Bank v. Board*, 200 Iowa, 131, 204 N. W. 223; *Lamont Savings Bank v. Luther*, 200 Iowa, 180, 204 N. W. 430; *First National Bank v. Board*, 199 Iowa, 1124, 201 N. W. 269. The remedy afforded by the statutes of Iowa, which the Supreme Court of that state has held is exclusive, has been found to be adequate by other national banks who raised the very question presented by the petitioner in the case at bar. If the remedy thus afforded is adequate for other national banks and state banks, it is adequate for the petitioners.

In addition to the fact that other banks have found the remedy afforded by the statutes of Iowa to be adequate, the record in the case at bar discloses that the petitioner banks knew, long before the board of review passed upon the assessments and certified the same to the county auditor, what their position was in regard to the classification and assessment, not only of their stock, but the other taxable property in the taxing district as well, and they at that time, with this information and knowledge, could have presented the identical question now raised.

It is contended that the petitioners had no ground for complaint or appeal to the local board of review, for the reason that the assessor had correctly listed and classified the stock of corporations whom the petitioners now contend were in competition with them, and therefore there was no ground for contesting the classification of the bank stock

on the basis of discrimination. In making this claim, however, they overlooked a class of property which they contend is moneyed capital in competition with bank stock,—that is notes and mortgages in the hands of individual citizens. This class of property was listed and classified by the assessor as moneys and credits and not as moneyed capital. The petitioners not only knew of this fact but aided and assisted the assessors in thus listing and classifying a large part of this property owned by individuals. The Iowa Supreme Court has held in this case that if, as contended by petitioners, this class of property was erroneously assessed and classified, their remedy was by appeal from the local board of review. No change was made in the classification of the notes and mortgages in the hands of individuals from that made by the assessor and confirmed by the board of review. The petitioners' remedy, if their contention be correct, was clearly that afforded by the statute of appearing before the local board of review and appeal.

Considering the class of property consisting of the stock of corporations which the petitioners contend were in competition with them and that they reason should have been classed the same as bank stock, viz. moneyed capital, we wish to refer to the opinion of the Supreme Court of Iowa in the case at bar wherein it is pointed out that this class of property was assessed and classified in the manner which the banks contend is the proper and lawful manner by the only official and board authorized to classify and assess property. The change made in the classification of this property was by the county auditor, whose act was unauthorized, illegal and void. The state or the municipalities thereof are not bound by such illegal act, and the petitioners cannot rely upon the illegal and unauthorized act of the county auditor to avoid the payment of their taxes. As the Supreme Court of Iowa pointed out, the taxes upon this class of property are unpaid. The state or the municipalities

thereof, through the proper taxing officials, have authority, and it must be presumed that public officials will perform their duty, to collect such unpaid taxes.

The record in the case at bar shows that the petitioners through their officers, were fully advised of the action taken by the county auditor in making the change in classification. They stood by and permitted these illegal and unauthorized acts to continue without availing themselves of the remedy provided by statute through certiorari. *First National Bank v. Weber*, 196 Iowa 1155, 1163, 1164, 192 N. W. 890. They thus became parties to the illegal act which they now seek to take advantage of to avoid the payment of their taxes.

PROPOSITIONS III AND VI.

Was There Competing Capital Not Taxed as National Banks Were Taxed?

This question was rather fully argued before the Supreme Court of Iowa, both by the petitioners here and the respondents here. However, in the argument here, the petitioner on this question says, "In view of the decision of the Court below, a recitation of the evidence which abundantly lists the existence of monied capital is unnecessary". We are unable to grasp the petitioner's stand in this matter for the lower Court did not conclude that there was competing capital and we believe that it is an absolute distortion of plain language to attempt to construe the Court's decision otherwise. The Supreme Court of Iowa said, "During these years, there were in the City of Des Moines a large number of persons and a few corporations who, *as we shall assume*, were employing monied capital in competition with plaintiffs". This can only be construed as meaning that the Supreme Court does not pass on that question as a fact, but assuming, for the purpose of the argument, the petitioners—plaintiffs

below—still were not entitled to the remedy. That fact issue then is before this Court, and we believe by the attitude of the petitioners in their argument (page 13) they have abandoned this contention because they give this Court no support.

We are truly tempted also to abandon argument on it, but because the matter is important and perchance the Court may consider it, we do submit the argument on that proposition.

In order to arrive at a basis of discussion, we look to Section 5219 of the Revised Statutes of the U. S. to determine *ON WHAT CONDITIONS ARE NATIONAL BANKS TAXABLE?*

We take the statement that "The consent of Congress to the taxation of the property and share of National Banks was evidenced by Section 5219" (Pet. Brief 37) as our starting point. To this consent the Congress has attached by Section 5219 TWO PROVISIONS ONLY:

> a. Not a greater rate than assessed upon other moneyed capital in the hands of individual citizens, and
> b. Shares shall be taxed where bank is located.

This provision (a) must be the basis of petitioner's contention and what that provision means is a controlling element in this case.

We agree then with petitioner that a determination of the meaning of that phrase "moneyed capital" is all important. Our courts have stated the following rules relative to this phrase:

> "The restriction applies as well where the competition exists only with respect to particular features of the business of national banks or where moneyed capital is employed, substantially as in the loan and investment features of banking, in making investments by way of loan, discount or otherwise in notes, bonds or other se-

curities, with a view to sale or repayment and reinvestment." *First Nat. Bank of Hartford v. City of Hartford*, 273 U. S., 548; 71 L. Ed., 767.

And this expression has been amplified in many cases but always the decision centers around the necessity of "competition," "substantially as in the loan and investment features" of national banks. In support we cite every case listed in petitioner's argument.

We must then all admit, *THERE MUST BE COMPETITION* and *WITH SUBSTANTIALLY SAME LOAN AND INVESTMENT FEATURES OF NATIONAL BANKS.*

Accordingly, we ask, WHAT ARE THE FEATURES OF NATIONAL BANK INVESTMENT AND LOANS? and

WHAT IS COMPETITION?

To determine what are the features of national bank loans and investments we may look to Federal legislation and we find regulations as to the features.

We quote from Ch. 461, 39 Statutes at Large, 754, Sec. 24, now Sec. 371, Title 12, Code 1926. From this, petitioner assumed blanket authority to make real estate loans.

Note these required conditions, quoted:

(a) Improved farm land.

(b) Unincumbered farm land.

(c) Upon land within Federal Reserve District. Within 100 miles of Des Moines.

(d) Limited to five years.

(e) Not in excess of 50% of actual value.

(f) Real estate within 100 miles not farm land.

(g) Not more than one year.

(h) Not in excess of 25% of capital or surplus or 33% of time deposits.

(i) Not in excess of 50% of actual value of security.

All such loans were limited in the aggregate to 25% of its capital and surplus or to 1/3 of its time deposits.

Before a company or individual shall be competing—with a "national bank" it must have its capital "employed substantially as in the loan and investment features of national banks." (*First Nat. Bank of Hartford v. City of Hartford, supra.*)

Now then, let us take some of the companies listed by the petitioner in its various tabulations.

Let us discuss the business of the various corporations, twenty-seven in number as to which evidence was taken.

In the statement of facts of this brief is a statement of the testimony relating to the business of each of these institutions. We have attempted in our abstracting the testimony to be accurate and if the Court or our opposing counsel discovers we are in error we stand corrected. We give to the petitioner's counsel credit for the same good intentions, but we find they are inclined to interpret—probably unconsciously guided by the spirit of the old adage "the wish is father of the thought,"—the testimony as they "wish" it to be rather than we believe it is. To make verbose quotations from the record would render no assistance to the Court, yet because of the importance of the case, the amounts involved and the principles of law to be established or followed, we are not justified in failing to be respectably thorough in our discussions.

Directing the Court's attention to Sec. 371, U. S. Code, 1926, above digested and to other bank regulations to be referred to, we attempt to distinguish between the corporations claimed to be in competition and the petitioner bank as to the substantial features of the employment of the moneyed capital.

The Security Loan & Investment Company, instead of limiting its loans to 50% of the value, had a habit of dividing loans—because they were larger than the 50 per cent

theory—into several notes, being one which represented a first class mortgage loan amount, and then the rest divided into smaller notes, which smaller notes were sold subject to the larger note, but all secured by the same mortgage. (Tr. 310.) (Page 1102 of printed record.) These, that is, the notes, which became equivalent to second mortgages, amounted to $300,000 to $350,000. The notes also bore a higher rate of interest and a portion of the interest rights was retained as commission. (Tr. 311.) (Page 1102 of printed record.)

The assessable net assets of the company January 1, 1919, given as $84,619 is the equivalent of its then capital and surplus. This amount was practically equalled by cash on hand $59,000, and Liberty bonds $19,400. The entire balance of all assets, loans, etc., about $540,000 was offset by moneys borrowed from the banks on which interest was being paid. (Tr. 316-317.) (Page 1103 of printed record.)

In 1920 the capital was $50,000 and surplus $14,000. At that time the company owed $700,000 to the banks and were paying interest. (Tr. 322.) (Page 208 of printed record.)

On January 1, 1921, the capital stock had increased and there was a loss and no surplus, and all the assets of $800,000 above the capital and surplus of $109,985 represented moneys borrowed from the banks on which interest was paid on $800,000.00. (Tr. 326.) (Page 208 of printed record.)

On January 1, 1922, $700,000 of assets represented moneys borrowed from the banks for which interest was paid, while the capital and surplus was $133,619. (Tr. 237.) (Page 208 of printed record.)

From these bits of testimony, we find in each case the actual capital used in making the loans was capital of the banks and the banks were being paid the interest and held the mortgages as collateral security. (Tr. 323.) (Page 1103 of printed record.) In other words, in the mortgage busi-

ness, the company instead of being a competitor was a broker or customer for the benefit of the bank. It made loans which banks could not make and by the company's method of operation reduced loans to a form acceptable to the banks as collateral and increased the business of the bank, rather than competing with it. It benefited the bank by keeping the bank's money operating on short time obligations and ready customers for its loans. If the company competed with the bank under these conditions, an automobile paint contractor would be in competition with the paint manufacturer, even though the contractor did work the manufacturer could not do and the contractor purchased his paint from the manufacturer. The job would be undone, unless there were some one to apply the paint. The bank's money would be idle if there was not a machine such as the Security Loan & Investment Company to accomplish what the bank could not do, and by that very accomplishment keep bank funds from being idle.

In addition to this, the Company guaranteed its second mortgages, advanced moneys to construct houses, financed the promotions of subdivisions, all of a type of business the bank could not and would not do. Is this competition, or are the banks "dogs in the manger"?

IOWA INVESTMENT & MORTGAGE CO.

This company was merely a broker, sometimes taking second mortgages for commission. Loans were for 142 months and of the Prudential Insurance Company money. If the mortgage company made advancements, it borrowed money from the banks. (See Statement of Facts of this argument for a fuller statement of its operations.) None of this was business the banks could do.

DES MOINES MORRIS PLAN.

This company was organized to do business with people who had no credit at the banks and to defeat the loan sharks. It loaned on two or three name paper not secured and loans averaged less than $200.00 payable in installments extended over one year. It bought installment contracts in the form of trade acceptances for washing machines, carpet sweepers, etc. The company is not a bank. (Page 254 of printed record.)

None of these types of business did the bank want and none of them could they do.

It is repetition of testimony to try in this way to digest the twenty-seven companies claimed to be competing but we took the three in the order named to show the Court that according to petitioner's witnesses the companies are non-competing. We refer the Court to our Statement of Facts of this argument for a resume of the testimony concerning all these companies.

With special reference to Joint Stock Land Banks, we submit:

Petitioner contended in the state court that these companies are competing with National banks. Their argument is anticipating what we have to say. Generally they say, the passage of the Federal Farm Loan Act, recognized the created institution as in the competing class of National banks.

This does not at all classify the Joint Stock Land Bank as in the same "moneyed capital class" as the National banks, but gives to the Joint Stock Land Bank the same protection as is given national banks against discrimination in favor of capital "employed substantially as in the loan and investment feature of" joint stock land banking.

(*First Nat. Bank of Hartford v. City of Hartford*, 273 U. S. 548.
First Nat. Bank of Guthrie Center v. Anderson, 269 U. S., 341, 70 Law Ed., 303.)

The Congress knew a concession of right to tax was necessary and enacted the reference to 5219, so as to protect the "joint stock land bank" against "other moneyed capital" "employed substantially as in the loan and investment features" peculiar to "joint stock land banks." This is so evident as to hardly justify a statement.

Instead of coming to the conclusion the petitioner's counsel propound, the very fact that a special act was prepared for "joint stock land bank" operation, shows Congress recognized there are many diverse types or classifications into which moneyed capital goes, and that the class of "joint stock land bank" investment was of "a substantially different type of loan with peculiar investment features" distinguishing it from "national banking" features—therefore, a special act and special enactments. Otherwise, a mere amendment would have served the purpose, but no, a "national bank" as such cannot make "substantially" the loans with the "investment features" of those made by the "joint stock land bank." That is the difference and that's why the plaintiffs were basically in error both in reasoning and as to including the two in the same class; and $490,814 in 1920, $424,969 in 1921, and $467,725 in 1922 of plaintiff's claimed competing "other moneyed capital" fades out of the picture.

In fact, we think that only in rare cases is there any evidence of even a substantial transaction by any of the alleged competiting corporations being done in the manner or method followed by banks or that the investment had the "features" of loans and investments as made by banks. That is, when the entire transaction is considered. As an example, a customer needing $11,000.00 is unable to get it at the bank, because his security is only $15,000.00. He ceases to be a bank customer. Instead he goes to one of the companies complained of by plaintiffs. He there obtains $10,000 but, how? He is given a first mortgage loan of $9,-

000.00 on an actual 60% basis, it too often proves to be, or 50% appraised basis of the security and $2,000.00 second mortgage. The $9,000.00 mortgage is deposited as collateral to a loan at one of the banks, legally, properly and to the bank profitably. The $2,000.00 loan is carried by the company and to resort to vernacular "and how long". This, the petitioner says, is "competition". This, we say, is non-competitive but instead a business production for the fortunate bank.

The banks seem to think they have a monoply on "credit". That any individual or institution using "credit" or giving "credit" is in "competition". That is not in keeping with the facts nor the law. It will be noted, the decisions do not say that competitive "individuals" are those making "loans or investments" but those "where money is employed substantially as in the loan or investment features of banking". It is the banking "features" which designate the similarity and not "investment" nor "loan" nor "credit".

Note Mr. Grant McPherrin, president of petitioner, Central State Bank, testifying thus, "A customer who bought a real estate mortgage of the bank, thereby became a competitor of the bank. An individual by becoming a customer became a competitor" and he further opines, "A clothier who extends credit to a buyer of a suit for payment on the installment plan is a competitor." (Page 1179 of printed record.)

It is this same thing running all through the bank's testimony and the only thing they have proven, that is, a great share of business is done on credit. The banks entirely miss the "investment features", except these: (1) a loan; (2) due date; (3) signed evidence of indebtedness, but they do not try to parallel these "banking features": (1) Limit to credit; (2) Limit of time of maturity; (3) Hazard of the loan; (4) Receipt of depositor's money; (5) Bankable quality of paper.

McPherrin says if a man could buy an automobile only on credit by a collateral mortgage or conditional bill of sale and he had to borrow the money from the bank, he wouldn't buy the automobile. On the other hand, he says if one does loan the money on such conditions, as a bank would not, and the sale is thereby consummated, that is an "investment" with the "investment features of banking". Practically the same thing was said by Capps, Slininger, Crawford and McKee and it stamps the character of the bank's contention as to what is "competition" and the value of their judgment as to what is "competition".

Not a bank loaned money to any person with a direct chattel mortgage on the automobiles and where payments were contracted for on installments. (Page 1177 of printed record.)

In discussing the facts as disclosed by the evidence to determine whether included in the term "other money capital" as used in Section 5219 of the Revised Statutes of the United States, definitions have been quoted by counsel for petitioner in their "brief and argument" and with these contentions of fact attempting to avoid discussion of law, we extract from those quotations the tests of "other moneyed capital" stated by the courts, and upon which petitioner relies.

1. *It "does not mean all capital,* the value of which is measured in terms of money".

2. It "is the nature of that employment which constitutes it in the eye of this statute 'moneyed capital' ", i. e., "operations in which the capital invested in national banks is employed".

3. It "includes shares of stock * * * in all enterprises in which the capital employed * * * is money."

4. "It includes money in hands of individuals employed in a similar way invested in loans or in securities for the repayment of money."

(*Mercantile National Bank v. Mayor,* 121 U. S., 138; 30 L. Ed., 895.)

5. It includes "investments of individuals in securities that represent money at interest and other evidences of indebtedness such as normally enter into the business of banking".

6. But it does not include "shares of stock in corporations that do not enter into competition with national banks".

(*Merchants National Bank of Richmond v. City of Richmond*, 256 U. S., 635; 65 L. Ed., 1135.)

"Competition" money as used is defined in decisions quoted by counsel for petitioner.

It is in competition:

7. "Where it is invested in shares of state banks or private banking."

8. "Where it is employed substantially as in the loan and investment features of banking, in making investments, by way of loan, discount or otherwise, in notes, bonds or other securities with a view to sale or repayment and reinvestment".

(*First National Bank of Guthrie Center v. Anderson*, 269 U. S., 341, 70 L. Ed., 303.)

9. Only where "there is a *clear showing* of such competition, *relatively material* in amount".

(*Merchants National Bank of Richmond v. City of Richmond, supra.*)

10. Only where "capital, *substantial in amount* when compared with the capitalization of national banks, is employed * * * in the *same sort of transactions* as those in which national banks engage and in the same locality in which they do business".

(*First National Bank of Hartford v. City of Hartford*, 273 U. S., 548, 71 L. Ed., 767.)

"The language of the Act of Congress is to be read in the light of this policy" * * * "The main purpose * * * of

Congress * * * was to render it impossible for the State, in levying such a tax, to create and foster an *unequal* and *unfriendly competition*, by favoring institutions or individuals carrying on a *similar business* and *operations* and *investments* of a *like character*".

(*Mercantile National Bank v. Mayor, supra*) and

There will be no remedy, unless "the capital thus used could readily be carried to a point where the business of national banks would be seriously curtailed".

(*First National Bank of Hartford, supra.*)

"Undoubtedly, there may be much personal property exempt from taxation without giving bank shares a right to similar exemption, because personal property is not necessarily moneyed capital."

(*Evansville National Bank v. Britton*, 105 U. S., 322, 26 L. Ed., 1053.)

We discuss the facts then, not unmindful of the law nor with an effort to evade the law as prescribed by Congress and as pronounced by the Supreme Court of the United States, but fully cognizant of it. However, by assuming the law of this case to be as contended by petitioner, we believe as a fact proposition the plaintiff has failed to establish "other moneyed capital" "relatively material" "substantial in amount" "when compared with the capitalization of national banks" "in the same locality" "employed in the same sort of transactions as those in which national banks engage" to be taxed different from the national banks so as to create or tend to "create and foster an unequal and unfriendly competion" or that the "business of national banks would be seriously curtailed".

The argument of petitioner that "the mere fact that competing corporations handled the loans in a *slightly* different

form is utterly immaterial", is not to be taken as either logical nor in accordance with law. Immediately following the contention quoted the petitioner urges as a result that a corporation engaged in the business of purchasing installment contracts from automobile dealers supplies the capital needed by the dealer to carry on his business, and obviates the necessity of borrowing from the banks, ergo it is a competitor. Not at all. The test is not that the "necessity of borrowing from banks is obviated".

If I pay my bills, I obviate the necessity of my creditor borrowing from the banks. If I am a wholesaler and sell on credit, I obviate the necessity of my debtor borrowing from the banks. Under such a test, if I pay my bills or if I sell on credit, I am a competitor of the banks. Such logic could be carried on *ad absurdum*. However, a little thing like that makes no difference to the petitioners, because they deliberately go that far. Witness, the bank president, giving his expert testimony on what is competition with a bank. Mr. Grant McPherrin, president of the petitioner Central State Bank, testifies:

> "We bought bonds because they were quick assets, and we could find a ready buyer and I consider a buyer as competitor."

Also:

> "We sold mortgages to our customers."
>
> Q. And if the customer bought a real estate mortgage of you, did he thereby in your judgment become a competitor of yours?
>
> A. Naturally I would consider him a competitor.
>
> "In other words, the individual by being our customer became our competitor." (Page 1179 of printed record.)

How strange. If you do not use the bank—you are in competition. If you use the bank, you are in competition.

With such absurdities, it cannot be possible the law agrees. Positively then, the test is not that you do or do not use the bank.

The courts have repeatedly said competition is where the money is used in the "same sort of transactions" "substantially as in the loan and investment features of banking."

It is only the "same sort of transactions" with "substantially" the same "features" that must be present.

Let us discuss the types of alleged "competing business"—

AUTOMOBILE SALES.

A company making sales of automobiles and taking a collateral mortgage on the automobile with installment payments, would be in competition with banks, according to Mr. McPherrin, yet "If he could only buy an automobile on that basis and he had to be financed by Mr. McPherrin's bank, he would not buy the automobile." (Page 1177 of printed record.)

It is on such testimony that the petitioners base their contentions that a company buying such paper was a competitor, while the banks in no instance bought such paper but loaned money to houses making such sales of automobiles. The same is true of other commodity sales to which reference is made by appellants in their argument.

The transactions of banks and the sales companies or their backers are not of the "same sort" nor having the "same features."

Not a bank *bought automobile* paper,

Not a bank *bought* automobile paper endorsed "without recourse."

Not a bank made *installment* collections of automobile paper. "It was not the general banking practice to handle

such paper." (Capps p. 366, lines 12-13; Denial Abst. p. 59, line 11.) (Page 496 of printed record.).

The banks (a) *loaned money* to automobile dealers, (b) took a note, (c) of demand sixty or ninety days only, (d) took collateral security sometimes but not installment contracts, and (e) did not own the purchasers' notes or mortgages.

The so-called "competing automobile finance companies" did not (a) loan the money to automobile dealers, (b) did not take a note, of (c) short time or other time, (d) did not take collateral, but (e) bought and owned the automobile paper including the installment contract. They bought with endorsements "without recourse" and took their pay in installments.

The transactions were neither of the "same sort" nor did they have the same "features". Neither did it divert business from banks for with the banks "the automobile would never have been sold". It did increase bank business for banks financed by the "competing (?) finance companies." (Abst. p. 169, lines 20-21,) (Page 299 of printed record.)

CATTLE LOANS.

This type of loan the banks call "competing". The United Cattle Loan & Livestock Corporation is cited as typical competitors. Let us see. The testimony relative to this company is in the Abstract pages 170-171, 187-193, and Denial Abstract pages 27-29.) (Pages 300 and 317 of printed record.)

> "The loans were all secured by chattel mortgages which were first liens upon cattle. Most of the loans were on ordinary feeder stock and ran from sixty days to six months." (Abst. 170, lines 31-2 p. 171,) (Record 300.)

The banks have not testified to a single loan made on security of cattle. The Iowa National Bank bought such paper unqualifiedly endorsed by the Financing Company. In the petitioner's tabulation, however, as to bank business they include notes of country banks, secured by collateral notes secured by the cattle endorsed by the borrowing bank. The estimates of amounts of money so furnished country banks and by them used in making cattle loans is pure guess on the part of the banks. (Tr. 2127-28.) (Page 503 of printed record.) The distinguishing "features" between the "competing business" and the banks are principally these:

a. The banks did not even meet the cattle man.
b. The bank did not loan to the cattle man.
c. The bank loaned the company or cattle finance company.
d. The bank took as collateral, not cattle or stock, but the endorsed note and endorsed mortgage as collateral.

The reverse is what the company did. These very things, the hazard of dealing with cattle borrowers, the number of borrowers, long time quality are things the banks want to avoid, and instead of loan companies being competitors they are relieving the banks of the undesirable features and making it possible to increase the business quantity of the bank.

FINANCING PUBLIC IMPROVEMENT CONTRACTS.

The contention that such business was done by banks and by "competing corporations", must be borne out by more than statement of counsels' contention and must be borne out under the rules of law as to "similar features" and transactions of the same "sort".

Let us take the Iowa National Bank as an example as to how this business was done by them.

In his direct testimony Mr. Capps very definitely states "The bank advanced funds to such contractors for the purpose of defraying expense if the work, having (a) an agreement with the contractors (b) for the purchase from them at a stated price of public improvement certificates or bonds, which (c) they might receive in connection with the work". (Abst. 334, line 30-line 1, page 335.) (Page 464 of printed record.)

However, on cross examination, we get quite a different story. It is this:

(a) Money was advanced on the borrower's notes, (b) which were "demand or for a period of two to three months" and (c) he only thinks there was an agreement to take the public securities, but (d) the notes were secured by an assignment of the contract and a bond to complete the work (Transcript 2350-2351.) (Page 509 of printed record.)

Let us now take the Bond & Mortgage Company of Iowa as typical of the alleged competitors for this business.

"During the progress of the work the company would provide funds to enable the contractor to proceed with his work to meet his payrolls, pay for his material, freight bills and things of that sort, and then when the work was completed the bonds were turned over."

"We usually made these arrangements—to finance the work,—by taking an assignment of the contract and the proceeds to be delivered, before the work was begun. This took eight or nine months."

These "features" are vitally different. The bank had short liquid notes. There was no agreement shown. The contract was collateral security.

The company did not have short paper, did take the contract assigned to it and the proceeds went to the company. This was not security, it was co-operative dealing in the contract.

The banking business was increased because the company borrowed from the Valley National Bank, put up collateral for the loan and told the bank why they were borrowing and the bank did not complain, and knowingly, for the purpose of increasing the corporation's business, permitted the corporation to borrow without any complaint and wished the corporation success. (Page 305 of printed record.)

How can this be competition? It made possible credit circulation with the features the bank could not, but it increased bank business.

MORTGAGE & INVESTMENT COMPANIES.

This type of company is complained of by petitioner as competing. It is true some companies made farm loan mortgages and some banks made farm loan mortgages. The distinguishing "features", however, seem to be the things which the petitioner has full capacity to ignore.

In another part of this argument, we refer to 1926 U. S. Code Section 371, Title 12, setting forth the conditions under which national banks can make farm loans. By reference and to prevent repetition, we here adopt all that is there said.

Petitioner claims in its argument that the Iowa National Bank in one year carried $750,000.00 in farm loans for the Bankers Life Company for a period of approximately three months.

In 1919 it was a provision of the national Banking Act that a national bank could not have in excess of 25 per cent of its capital invested in real estate loans at one time. As to the Iowa National Bank in 1919 $750,000 would be far in excess of one-fourth of its capital. Still on Exhibit "H", the Iowa National Bank's statements of Real Estate loans by it in 1919 includes $760,000 of the Bankers Life Company real estate mortgage investments. (Tr. 1954.) (Page 1141 of printed record.)

However, the notes and mortgages were transferred to the bank and held by them, not until paid, but until the Bankers Life Company took them up again for their own investment. The Bankers Life Company had an agreement so to do.

The agreement was made with Homer Miller as president of the Bank (Tr. 1953). In fact the agreement was in the nature of a *demand* loan with collateral security and "*demand*" was recorded on the ledger card Exhibit "G". The account was paid out March 1, 1919, and ran from $67,000.00 and up to $760,000.00. The Iowa National Bank did not collect nor sell a single one of these mortgages. During these years the bank "made many loans with real estate security as collateral". Note the evasion of the bank on this proposition:

In other words the bank loaned the money to the insurance company and took the mortgages as collateral. If, however, this had appeared as a straight loan it would have been illegal as being more than ten per cent of the capital and surplus, therefore they camouflaged it as above.

> "Q. So that as a matter of fact, what you claim was buying loans from the Bankers Life Company was merely a substitute for extending them credit so as not to get in conflict, if possible to be avoided, with the Acts of Congress and the rules of the controller, wasn't it?
>
> A. My answer is that we did carry them."
> (Printed record page 1141.)

How ridiculous for the Bank to say they invested in Real Estate loans and then to say Real Estate loaning companies were competitors, and to use the Bankers Life Company mortgages as an example of the investment of the bank and also as evidence that the Bankers Life Company was a competitor.

They might well say for it is the same logic (?) "When they loaned money to a shoe factory to operate its business, and the note was secured by a warehouse receipt for shoes, the bank's money was invested in shoe manufacturing. As a consequence the money invested in shoe manufacturing is 'competing'."

If this sort of argument by them be carried to its conclusion all capital is "other moneyed capital", and the decision of the U. S. Supreme Court quoted by our learned adversaries:

> "Undoubtedly, there may be much personal property exempt from taxation without giving bank shares a right to similar exemption, because personal property is not necessarily moneyed capital." (*Evansville National Bank v. Britton, supra*, cited by appellants their argument page 31)

is repealed by petitioner.

This drives us back to a same view of "moneyed capital" with "same features" as used by National Banks. It must mean what it says. Feeders of business and customers of business to and with the National Banks must not thereby be construed to be competitors. It is when they draw business away and when "the business of national banks would be curtailed," (*Mercantile National Bank v. N. Y., supra*) that competition arises and not until then.

It was impossible and illegal for the banks to make this quantity of real estate loans and in fact to make the most of them, but their banking business and ramifications could be and were legitimately increased. And this is competition?

SMALL LOANS $300 AND UNDER.

The banks have furnished lists of numbers of loans they have made in amounts of $300 or less and claim this type of business is competitive with the so-called small loan companies. Let us inquire.

The loans made by the small loan companies were made on security of household furniture or such collateral and paid in installments. The time of payment was either weekly or monthly over a period of six to ten months, and to those who had no credit at the banks.

The banks would not take the furniture or other chattels as securities, had no installment notes, and did not cater to this business. If their notes were paid in installments, it was because notes were not paid when due and extension of time had to be given in order to collect. Never was this done intentionally at the time of the original loan.

How this can be business of the same kind, we are unable to fathom.

NO MATERIAL COMPETITION OF WHICH NATIONAL BANKS CAN COMPLAIN.

In a case brought by a national bank, claiming that there was discrimination under Section 5219 of the Revised Statutes in favor of savings banks, because the national bank was taxed on its shares and the savings bank taxed on its capital, the court held that there was no discrimination. The court holds that, while there may not be absolute equality in the taxation of the two kinds of banks, there was not sufficient difference to justify them in saying the tax was invalid. The court says, in that connection:

> "The taxation of shares in incorporated companies which may have something of value by reason of good

will is not, we think, regarded as resulting in inequality of taxation as between shareholders and others owning property similarly employed. Some slight latitude is allowed in modes of assessment demanded by what is deemed controlling considerations, even though they should not result in absolute equality of taxation."

Davenport National Bank v. Board of Equalization, 64 Iowa, 140-3.

In affirming the above case of *Davenport National Bank v. Board*, the Supreme Court of the United States holds that deposits in savings banks are not such moneyed capital as to be in competition with national banks, and says:

"The whole subject has been recently considered by this court in the case of *Mercantile Bank v. New York*, 121 U. S., 138 (30:895). In that opinion it was held that, while the deposits in the savings banks of New York constituted moneyed capital in the hands of individuals, yet it was clear that they were not within the meaning of the Act of Congress in such a sense as to require that because they were exempted from taxation, the shares of stock in national banks must also be exempted. The reason given for this is that the institutions generally established under that name are intended for the deposits of the small savings and accumulations of the industrious and thrifty; that to promote their growth and progress is the obvious interest and manifest policy of the State; and, as was said in *Hepburn v. School Directors*, 90 U. S., 23, Wall. 480 (23:112), it could not have been the intention of Congress to exempt bank shares from taxation because some moneyed capital was exempt."

Davenport National Bank v. Board, Law Ed. 31 U. S. Rept., 94 and 123 U. S., 83.

Georgetown Nat. Bank v. McFarland, 47 (U. S.) Sup. Ct. Rept., 467.

Our Supreme Court, in deciding when it has been shown that there is such competition by other moneyed capital, taxed at 5 mills on the dollar, as to constitute discrimination, has fully discussed the matter in the case of *First Nat.*

Bank Guthrie Center v. Anderson, 196 Iowa 587, from which we have quoted fully under division IV of our argument.

A private bank should not be assessed as "moneyed capital", nor is it discrimination to allow state banks to deduct exempt securities and certain liabilities, while a private bank cannot.

Manning's Bank v. Armstrong, 211 N. W., 485-7.

It is not discrimination against national banks or their stockholders, that private banks may deduct government bonds and stock otherwise assessed, while a national bank cannot.

Head v. Board, 170 Iowa, 300.

Stock in a national bank should not be taxed as moneys and credits. Mortgages held for investment by individuals is not "moneyed capital" in competition with banks.

(Full discussion.)

1st Nat. Bank, Montezuma v. Board, 199 Iowa, 1124-34.

The Iowa Court, in *First National Bank v. Anderson*, 192 N. W., 6, through Judge Arthur states:

> "Speaking to this point, the Court, in *Commercial Nat'l Bank v. Chambers*, 182 U. S., 556, said: 'The claim of the benefit of the provisions of Sec. 5219 of the Revised Statutes of the U. S. is unavailing, for the reason that there was neither averment nor proof of facts taking the case out of the operation of the recent decisions of this Court. These decisions held that the term moneyed capital as employed in Sec. 5219, forbidding greater taxation of shareholders of National Banks than is imposed on other moneyed capital, does not include capital which does not come into competition with the business of National banks, and that it must be satisfactorily made to appear by the proof that the moneyed capital claimed to be given an unjust advantage is of the character just stated."

And the Iowa Court, in the cited case, endorsed and applies the rule, and states its conclusions as follows:

> "It was, therefore, incumbent upon it (the bank) to allege the ultimate facts with sufficient fullness to enable the court to ascertain therefrom what, if any, 'other moneyed capital' is loaned in Guthrie Center and vicinity in competition with the normal and ordinary business of appellant and whether the amount is 'relatively material', the demurrer to the petition was properly sustained."

Amount must be relatively material:

The rule is laid down that the moneyed capital which comes into competition with national banks, must come into substantial competition with it, and must, as well, be substantial in amount.

Cases on point:

Merchants National Bank v. Richmond, 256 U. S., 635.
Mercantile National Bank v. N. Y., 121 U. S., 138.
First National Bank v. Chehalis, 166 U. S., 440.

Thus our own State Supreme Court, in several recent decisions, has denied relief becouse the plaintiff bank had failed to prove that a substantial amount of other moneyed capital in competition with national banks was being favorably taxed.

First Nat. Bank of Newton v. Board, 204 N. W., 223.
Jasper Co. Savings Bank v. Board, 202 N. W., 387.
Citizens Nat. Bank v. Treas., 202 N. W., 382.
Montezuma Savings Bank v. Board, 202 N. W., 386.
Poweshiek Co. Savings Bank v. Johnston, 202 N. W., 384.

As the court states, through Justice Faville, in *Montezuma* case, 201 N. W., 769, *supra:*

> "97 assessment rolls were introduced. In 76 of the assessment rolls which were offered in evidence there was no showing whatever as to the character of the money and credits that were assessed, *nor how the same were obtained by the taxpayer.*"

Thus it is clear plaintiff has the burden of proving not only that other moneyed capital, actually in competition with banks is escaping equal taxation with banks, but that the amount is relatively substantial.

Many cases have laid down as the rule expressing the purpose of S. 5219 as follows:

> "The purpose of the restriction is to render it impossible for any state, in taxing the shares, to create and foster an unequal and unfriendly competition with national banks, by favoring shareholders in state banks, or individuals interested in private banking."
>
> *Mercantile Nat. Bonk v. N. Y.*, 121 U. S., 138.
>
> *Des Moines Nat'l Bank v. Fairweather*, 68 L. Ed., 190.
>
> *First National Bank v. Anderson*, 70 L. Ed., 171.

and, hand in hand, with that purpose the cases lay down the additional rule:

> "The term 'other moneyed capital' is intended to include only that capital which is employed in such a way as to bring it into substantial competition with the business of national banks" (cases *supra*).

The Iowa Supreme Court, in *First National Bank v. Anderson*, 192 N. W., 6, expressed the view that the U. S. Supreme Court, in the case of *Merchants Nat'l Bank v. Richmond*, 66 L. Ed., 1135, broadened the rule, and that Congress, in an effort to carry out their intention as expressed in S. 5219, therefore passed the following amendment:

(Act of March 4, 1923, Chap. 267, 42 Stat. at L. 1499 Fed Stat. Anno. Supp. 1923, p. 84) reading now as follows:

"In the case of a tax on said shares, the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of *individual citizens* of such state coming into competition with the business of national banks; provided, That bonds, notes, or other evidence of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section."

The U. S. Supreme Court, however, in *First National Bank v. Anderson*, 70 L. Ed., 171, takes exception to this opinion in the following language:

"The defendants say that this re-enactment was intended as a legislative interpretation of the prior restriction and that the proceedings resulting in its adoption so show. But, assuming that this is true, the situation is not changed; for the re-enactment did no more than to put into express words that which, according to repeated decisions of this court, was implied before. In *Mercantile Nat. Bank v. New York, supra*, where the terms and purposes of the restriction were much considered, it was distinctly held that the words 'other moneyed capital,' must be taken as impliedly limited to capital employed in substantial competition with the business of national banks. In later cases that definition was accepted and given effect as if written into the restriction. It, of course, would exclude bonds, notes or other evidences of indebtedness when held merely as personal investments by individual citizens not engaged in the banking or investment business, for capital represented by this class of investments is not employed in substantial competition with the business of national banks. Thus in legal contemplation and practical effect the restriction was the same before the re-enactment as after."

Our own Supreme Court, it appears, has been willing to go further in its holdings. Their attitude on the proposition was stated as follows, in the *Anderson* case, 192 N. W., 6:

> "The Supreme Court of the United States, so far as we are advised, has never had occasion to pass upon the question whether money thus loaned may be said to be invested or loaned in competition with national banks. Upon this question, the decision of the Supreme Court, when announced, will be final; but, until that time arrives, we must adopt and follow our own interpretation of its prior decisions and of the laws of Congress. Surely, moneyed capital loaned and invested by banks, as the agents of their customers, cannot be said to be loaned in competition therewith. Competition means rivalry, and the loaning of money by national and other banks for individuals at a profit, or for the convenience of such owners, is lacking in all the essentials of competition."

Accordingly, they have placed their interpretation on the meaning of the section. In *First National Bank of Montezuma v. Board*, 201 N. W., 769, the court says, through Faville, Justice:

> "As said in *First Nat'l Bank v. Chehalis*, 166 U. S., 440, the main purpose, therefore, of Congress, in fixing limits to state taxation or investments in the shares of national banks, was to render it impossible for the state, in levying such a tax, to create and foster an unequal and unfriendly competition by favoring institutions or individuals carrying on a *similar business and operations and investments of a like character.* (The italics are ours.)
>
> In *First Nat'l Bank v. Chehalis, supra*, the court recognizes the fact that moneyed capital may include shares of stock owned by individuals in all enterprises in which the capital employed in carrying on its business is money where the object of the business is the making of profit by its use as money. The case also

recognizes that the term may include money in the hands of individuals employed in a similar way.

"The case is also authority for the conclusion that money invested in corporations, or in individual enterprises that carry on the business of railroads, of manufacturing enterprises, mining investments and *investments in mortgages*, does not come into competition with the business of national banks, and is not, therefore within the meaning of the Act of Congress."

The Court further states:

"It certainly cannot be said that a land owner in Iowa, who sells his farm representing a part of the purchase price of said real estate, is the owner of moneyed capital in competition with the business of a national bank. Nor can it be contended that a citizen of the state, who deposits money in a bank and receives a time certificate of deposit therefor, bearing interest, is the owner of moneyed capital in competition with a national bank. Nor can it be said that the citizen of this state, who purchases and owns a real estate mortgage as an investment of funds which he may own, by such a transaction becomes the owner of moneyed capital in competition with the business of a national bank; and yet, such securities and evidences of indebtedness are property subject to classification as moneys and credits, and are taxable as such under the laws of this state."

In this case, it was shown that $60,350.00 represented purely investment loans on real estate, and the $26,150.00 loans on chattel security. The court held it to be moneys and credits, and not within the meaning of S. 5219, and adopts as a rule that investments in mortgages do not come into competition with national banks.

Other recent cases hold in accord with the *Montezuma* case.

Powesheik County Sav. Bank v. Johnston, 202 N. W., 384.
Jasper Co. Bank v. Board, 202 N. W., 387.
Citizens Nat. Bank v. Johnston, 202 N. W., 382.

Under the petitioners' own figures there are only two classes of so-called other moneyed capital that come into competition with the bank stock. These classes are, first, the loan companies which had capital invested in the taxing district, varying from $1,876,000 in 1919, to $6,329,000 in 1922, no showing as to what there was in 1918; second, notes and mortgages in the hands of individual citizens residing in the taxing district.

As we have heretofore pointed out, the plaintiffs' contention, and that which they must prove, to wit, that the taxing and assessing officials were intentionally, systematically and designedly administering the statutes of this state so as to discriminate against the stock of plaintiff banks and in favor of other moneyed capital in the taxing district, cannot be sustained for the reason that the only taxing officials who were authorized to make a classification of property subject to taxation correctly classified the stock of the loan companies in question. This part of the moneyed capital, therefore, must be eliminated from the case insofar as any claim to a systematic and intentional administration of the law discriminating against plaintiffs is concerned, and the only moneyed capital substantial in amount and that it is even claimed is materially in competition is that of the notes and mortgages in the hands of individual citizens. In order that the stock of loan companies or the notes and mortgages in the hands of private individuals can be said to be moneyed capital in competition with bank stock, it must be shown—

(1) That they were moneyed capital within the meaning of Section 5219, R. S. U. S.;

(2) That the capital of each company or individual is substantial in amount as compared with the bank capital, and materially in competition with the banks: In other words, it must be shown that the banks were doing a material part of their business along the lines

in which those claimed to be in competition with them are engaged;

(3) That there is an intentional, systematic plan or conspiracy on the part of the taxing officials to discriminate against the stock of the banks in favor of the other moneyed capital.

In the first place, the capital of any individual loan company, as shown in this record, is not substantial in amount as compared to the capital of the banks, or any one of them. We do not think that it can be contended that all the capital of loan companies in the taxing district can be added together for the purpose of determining whether or not the amount is substantial. If this were true, it might be possible that there would only be one large company with a capital substantial in amount as compared to bank capital and a small company whose capital would not be substantial in amount. The combined capital of these two companies would thus be substantial as compared to bank capital, but the erroneous classification made only of the capital of the large company would not entitle the bank to any relief. This would merely be a sporadic instance of erroneous classification or taxation and not such an act as to entitle the banks to claim that they were discriminated against. If this is true, then each individual company must stand on its own feet and its capital be compared alone with that of bank capital. There is not a company of this nature shown in the record that has capital substantial in amount as compared to bank capital that will bring it within the provisions of Section 5219.

Furthermore, the business of a loan company must be materially in competition with a material part of the bank's business. The fact that banks might occasionally prepare a Will would not warrant the assertion that a material part of their business was the law business. Bank also write insurance but it is not part of the banking business, or even

handle estates in probate as they now do. The banks, as the record shows, are not materially engaged in loaning money in the same manner as the loan companies complained of. Their method and plan of doing business is entirely different and distinct. A reading of any of the citations of the Supreme Court of the United States will substantiate this contention. In other words, as the Supreme Court of the United States in the *First National Bank v. Anderson*, 269 U. S., 341, 70 Law Ed., 295, said in respect to what was other moneyed capital in competition with bank stock, that it must be shown that this moneyed capital is "employed, substantially as in the loan and investment features of banking, in making investments by way of loan, discount or otherwise, in notes, bonds or other securities, with a view to sale or repayment and reinvestment."

Plaintiffs single out the different features named in this quotation and say "notes", "bonds" and "securities" are in competition with bank capital, while as a matter of fact these investments are not in competition with bank capital unless they are made "substantially as in the loan and investment features of banking". The records show that these investments are not made as in the loan and investment features of banking, but are made in an entirely different manner. In fact, the loans are made in such a way that in most instances the banks would not handle them at all, so it cannot be said that the capital of the loan companies is materially in competition with the business of banks.

It also must be shown that the assessorial bodies *properly charged with and having authority* to make a classification of property, intentionally and systematically carried on a plan or conspiracy to discriminate against bank capital in respect to loan companies. The evidence fails entirely to substantiate this allegation, but on the contrary shows that the bodies properly charged with the classification of property for taxation purposes correctly classified the capi-

tal of loan companies in the manner contended for by the plaintiffs. The county auditor and board of supervisors have nothing whatever to do with the classification of property and, as our court has said in the case heretofore cited, the action of a county auditor in changing a classification is illegal and void.

(*Fort Madison Security Company v. Maxwell, supra.*)

Turning to the notes and mortgages in the hands of individual citizens, we cannot concede that these investments meet any of the requirements necessary to bring them within the provisions of Section 5219 and thus taxable as moneyed capital in competition with banks. A reading of the cases most relied upon by appellant—that is the two recent decisions of the Supreme Court of the United States, in *First National Bank of Hartford v. Hartford*, 71 Law Ed., 767, and *State of Minnesota v. First National Bank of St. Paul*, 71 Law Ed., 744, will fail to show that the decisions supported plaintiffs' contention as to this class of property. In the *Hartford* case the Supreme Court speaks at all times about the capital employed in the *business* of those alleged to be in competition with the banks. Furthermore, the evidence was not contradicted and the court in the cited case, as well as in the other decisions upon which plaintiffs must rely, complains of this fact. In the *Hartford* case the Court said:

> "The evidence might have been directed more in detail to the precise character of the competition. But that offered was uncontradicted, and when it was shown that national banks in the State of Wisconsin having a capital and surplus in excess of fifty millions of dollars are engaged in the business of making loans, and that there is *an extensive loan business* in the state not subjected to the tax burdens of national banks, and it was testified directly that *this business* came into competi-

tion with the business of plaintiff and other national banks, we think that the finding of the trial court was supported by the evidence and should not have been disturbed."

It was testified directly in the case at bar that loan companies and individuals were not in competition with the banks. It was upon this basis that the *Hartford* case was decided and it only refers to the "*business*" of making loans and other investments that come into competition with banks. The individuals shown in the record in the case at bar are not engaged in the "*business*" of making loans on any kind of securities in which the banks deal. The *business* of all of these individuals was something entirely different and distinct from the loan and investment business as featured by banks. In fact there were lawyers, doctors, farmers, drygoods and clothing merchants, retired business men, women, guardians, trustees and other individuals before the Court, but *none of them were engaged in the business of making loans and investments.* This is the same theory upon which the case of *Minnesota v. First National Bank, supra,* was decided. Our contention is clearly supported by the decision of the Supreme Court in *Georgetown National Bank v. McFarland,* decided at the same time as the *Hartford* and *Minnesota* cases, reported in 71 Law Ed., 779, for in the last cited case the Court said:

"Plaintiff in Error, seeking to establish that the favored capital was in competition with national banks, relied principally upon the proof that there were substantial amounts of capital invested in the state by individuals in bonds, notes, accounts and mortgages, aggregating approximately $1,500,000, which it is contended represents moneyed capital in competition with national banks. *But the plaintiff made no attempt to show that there were other businesses or courses* of investment in the state employing moneyed capital in competition with its business or that of other national

banks. The evidence with respect to capital invested by individuals, taken as a whole, falls short of establishing that the capital thus used is employed substantially as in the loan and investment features of banking, in making investments by way of loan or discount or in notes, bonds and other securities, with a view to sale or repayment and reinvestment."

We believe that the Supreme Court of the United States in all of its decisions has established the rule that there must be a competitive *business* with national banks, either carried on by individuals or corporations, and that the capital used in this *business* must be employed substantially as in the loan and investment features of the banking business by way of loan or discount or in notes and other securities with a view to sale and repayment or reinvestment. We do not believe that it can be contended and certainly there is no express language in any of the decisions of the United States Supreme Court holding that investments of individuals in a note and mortgage held for the purpose solely of the individual's profit by obtaining the interest thereon until the note is paid, is in any way employed as in the loan and investment features of banking. To be so employed, the notes must be purchased with a view to sale or re-discount and reinvestment. Not an individual shown in this record is so engaged. It was also said by the Supreme Court of the United States in *First National Bank v. Anderson, supra,* page 304, in regard to whether notes and mortgages in the hands of individuals was moneyed capital within the meaning of Section 5219:

"It, of course, would exclude bonds, notes or other evidences of indebtedness *when held merely as personal investments by individual citizens not engaged in the banking or investment business,* for capital represented by this class of investments is not employed in substantial competition with the business of national banks."

The cited case also quoted from the decision in *Merchants National Bank v. New York*, 121 U. S., 138, 30 Law Ed., 895, which case was most strongly relied upon by us in the *Anderson* appeal.

In addition to the decisions of the Supreme Court of the United States, which we believe when properly interpreted hold that notes and mortgages in the hands of individuals, unless engaged as a business in some feature of the banking business, are not moneyed capital within the meaning of Section 5219, there are a number of recent decisions of the Supreme Court of this state holding squarely that securities of this nature are not moneyed capital within the meaning of said section. We refer especially to the decision of our court in *First National Bank of Montezuma v. Board of Review*, 199 Iowa, 1124, wherein a full discussion of this question is had and a complete analysis made of the decisions of the Supreme Court of the United States bearing upon this question. The only class of property which it was contended was in competition with bank capital in the cited case was notes and mortgages in the hands of individuals. See also *First Nat. Bank of Newton v. Board*, 200 Iowa, 131. There was no evidence or testimony of any loan companies or any business coming into competition with banks. The District Court held that notes and mortgages in the hands of individual citizens, such as are shown in the record in the case at bar, were moneyed capital within the meaning of Section 5219. The Supreme Court, however, in the cited case, at page 1135, said:

> "We reach the conclusion that, upon the record in this case, the trial court was in error in holding that there was moneyed capital within the taxing district which was taxed in any different manner than the shares of appellee bank were taxed."

See also *First National Bank of Newton v. Board*, 204 N. W., 223.

The petitioner has introduced evidence of transactions of various U. S. Land Banks as being in competition with National Banks. It would seem that if the National Banks were already performing the duties of the Land Banks there would have been no need to provide for such banks. Evidently Congress did not consider that the Land Banks would in any way compete with or cause it competition with the National Banks.

We are confident, therefore, that notes and mortgages in the hands of individual citizens fail to meet any of the three requirements necessary in order to entitle plaintiff to relief. Apparently plaintiff has largely abandoned any contention in respect to notes and mortgages in the hands of individuals and relies almost entirely, if not exclusively, upon the illegal classification of loan companies by the county auditor and, as we have pointed out, and the Iowa Supreme Court has held, this illegal act cannot avail petitioner in an action to recover taxes properly paid.

In conclusion we would again draw the court's attention to the rule that has been laid down by it that it is only when the moneyed capital in the hands of competitors draws business away from the banks and when thereby "the business of the national banks would be curtailed", (*Mercantile National Bank v. New York, supra*) that competition arises within the meaning of Section 5219. Applying this rule to the actual situation as disclosed in the evidence of the banks in this case it appears that not only the Iowa National Bank and the Central State Bank but also the Valley National Bank and the other banks as to which evidence was taken were doing all of the business that they cared to do or wanted to do along the lines as to which they are complaining there is competition. They admit that they all got all the real estate loans they wanted, all the automobile loans they wanted, all the cattle paper they could carry or cared about, and also all the small loans, and the evidence further shows

that during this period they were making profits which were unsurpassed in their history, which profits were reflected either in dividends or in increased surplus. It is, therefore, clearly apparent that even if there was a technical violation of Section 5219 on account of the illegal act of the Auditor, the banks, both national and state, did not in any way suffer therefrom. Certainly the claim that they might have suffered under some circumstances would not be sufficient justification for letting them escape their fair share of the taxes on account of an illegal act of one of the taxing officials.

Petitioner is not claiming any title, right, privilege or immunity within the meaning of Judicial Code Section 237. There can be no right, privilege or immunity, to be taxed improperly and contrary to law and in a less amount than the law provides, because some one else is improperly and contrary to law taxed in a less amount than he should be on account of the illegal and improper acts of a ministerial official, such as the county auditor in this case. Petitioner is not claiming that the provisions of the law as to its taxation have not been properly carried out, it admits that they have. What it is claiming is that because certain other persons, who it claims were in competition with it, were allowed by the illegal acts of the county auditor to be taxed at a less rate than the law required, then petitioner should also be allowed to escape a part of its taxes, contrary to law. Thus adding to the wrong already committed against the taxpayers who have been legally taxed and who must make up and pay the taxes escaped by the petitioner and other persons illegally taxed in too small an amount. Certainly no privilege or immunity, under the Constitution of the United States could arise under this state of facts. The Constitution is a shield, and was not adopted for the purpose of perpetuating and increasing a wrong already committed, or to put peo-

ple on an equal basis by allowing them all to commit the same wrongs. The following case supports this proposition:

State v. Hall, 54 Southern 560.

In that case the Supreme Court of Alabama had before it a question of assessment for taxes in which the complainant alleged that her assessment was illegal because while complainant's property was valued at, or near its full value for assessment purposes there was property of other people that had been assessed on the basis of only 60% of its value. The 60% valuation, however, was contrary to the law of the State which provided that property should be assessed at its full value. The Court in holding that under such circumstances the complainant could not appeal to the equal protection clause of the Constitution used language that seems so appropriate in the instant case that we cannot refrain from quoting same as follows:

> "Further comment would seem to be unnecessary. In the present case there has been no discrimination against the appellee by the laws of the state, nor by any of its constituted authorities. It is doubtless true that some of its officers are not enforcing the provisions of its tax laws looking to the assessment of all property at its true value. But the laws forbid discriminaton; nor is there lodged in any tax officer or board, nor even in any court, an unrevisable discretion, nor any diseretion at all, as to the mode and basis of assessments. The 'equal protection of the law' cannot mean equal immunity in its violation or evasion. If the police officers of a city should by concerted agreement, but in flagrant dereliction of duty, enforce the prohibition laws only against certain ones among those engaged in their violation, this does not beget a constitutional right in favor of one thus discriminated against, to operate a blind tiger. To so interpret the fourteenth amendment would be to make of it a Tarpeian rock, upon which may be flung to their death the domestic laws of every state. A condition of maladministration being once established through the

infidelity of public servants, reform might become impossible, since every lawbreaker may have acquired by virtue of the protection of the fourteenth amendment the right to pursue his nefarious course unmolested, so long as others are not disturbed. We are aware that we are stating an extreme case, but it comes fairly within the scope of the argument, and legitimately illustrates the vice of appellee's contention. We are clear in the conclusion that the appellee cannot invoke the fourteenth amendment as a means of evading the rule established by the statutes of this state for the assessment of her property for taxation."

PROPOSITION IV.

It is to be borne in mind in this case that there is no claim that the law in Iowa in and of itself creates any discrimination as against a national bank. The only claim is that the manner in which the law was administered by the taxing officials created such discrimination. Some of the cases seem inclined to lay down the rule that where the complaint of discrimination is based not on the state law itself but on the manner of its administration by the taxing officials, that it is then not sufficient for a complaining bank to show that there was moneyed capital that might be in competition with national banks assessed at a lower rate than the national banks, but the complaining bank must go further and show that there was moneyed capital being assessed at a lower rate which was actually in competition with the individual bank complaining. The reason for this distinction is sound. The discrimination created by law would apply as to all banks and would be presumed to be detrimental to them. A discrimination, however, caused solely by the acts of the taxing officers, whether legal or illegal, can only be complained of if the bank is damaged thereby. No person can complain in a court of law of the infringement of his rights unless he can show some damage and therefore it is essential in that

class of cases to show that the complaining bank has been damaged, or, in other words, that its actual competitors and not its possible competitors have been favored by a lower rate of taxation. This rule, in effect, has been announced by the Iowa Supreme Court in the case of

First Nat'l Bank of Guthrie Center v. Anderson, 196 Iowa 587.

In that case the Court in holding that no showing was made that moneyed capital in competition with the bank had been favored or taxed at a lower rate says:

> "Although it does not appear upon the face of the petition, it is a matter of common knowledge that banks, national as well as state, particularly in the rural communities of Iowa, are the instrumentalities through which much the larger portion of farm loans is made; that many banks, as such, or through others with which they are interested, act as agents of insurance companies and other financial institutions having large sums of money to loan upon farm security; and that the money of individuals is either loaned directly by the bank for the accommodation of the owner, who is its customer, or loans are made in advance by the bank, and later transferred to such other customers as have money to loan. The money of individuals loaned in the community thereby becomes a source of profit to the bank. It is also well known that money borrowed upon farm security finds its way at once, or ultimately, into the local banks, and is drawn out in the regular course of the borrower's business.
>
> "The Supreme Court of the United States, so far as we are advised, has never had occasion to pass upon the question whether money thus loaned may be said to be invested or loaned in competition with national banks. Upon this question, the decision of the Supreme Court, when announced, will be final; but, until that time arrives, we must adopt and follow our own interpretation of its prior decisions and of the laws of Congress. Surely, moneyed capital loaned and invested by banks, as the agents of their customers, cannot be said to be loaned in competition therewith. Competition means rivalry; and

the loaning of money by national and other banks for individuals at a profit, or for the convenience of such owners, is lacking in all the essentials of competition. The petition does not charge that the appellant bank is engaged in loaning its funds upon real estate security. Under the laws of Congress, it could not loan sums in excess of 25 per cent of its capital and surplus, or one-third of its time deposits. The amount of its time de-deposits is not alleged, but the net actual value of its capital, surplus, and undivided earnings is shown to be $91,507.83. It seems to us that the allegations of the petition are wholly insufficient to be made the basis of a holding that the tax in controversy is void because of the large amount of moneyed capital loaned upon farm security in Guthrie County by residents thereof. What amount, if any, of the money thus invested is loaned in competition with appellant is not alleged. We cannot infer from the facts admitted by the demurrer that the moneyed capital referred to is invested in competition with appellant. The burden of showing this fact rested upon appellant. *Merchants' Nat. Bank v. City of Richmond, supra; Boyer v. Boyer*, 113 U. S. 689.

"It was, therefore, incumbent upon it to allege the ultimate facts with sufficient fullness to enable the court to ascertain therefrom what, if any, 'other moneyed capital' is loaned in Guthrie Center and vicinity in competition with the normal and ordinary business of appellant; and whether the amount is 'relatively material'."

PROPOSITION V.

It is to be noted that the provision of Section 5219 of the U. S. Code is that the discrimination forbidden as to taxes as to "moneyed capital in the hands of *individual citizens*". Clearly here the intention was to refer only to money in the hands of natural persons who were citizens of the state, otherwise there is no particular use of using the word individual. It might all have been covered by the word citizen as a corporation can be a citizen of a state but a corporation has never been held to be an *individual* citizen. It was

squarely held by the Court of Appeals of Texas that the phrase "moneyed capital in the hands of individual citizens" referred only to moneyed capital owned by natural persons and not to such capital as belongs to corporations, and this opinion was based on various decisions of the United States Supreme Court. See

Prim v. Fort, 57 S. W. 972.

The United States Supreme Court cases, however, referred to therein as to authority for their finding are set out in a former decision of the same case, to wit:

Prim v. Fort, 57 S. W. 86.

The United States Supreme Court decisions there cited supporting their finding are

First Nat'l Bank of Aberdeen v. Chehalis Co., 166 U. S. 440.
Bank v. Chapman, 173 U. S. 205.
Mercantile Bank v. City of New York, 121 U. S. 138.

In the case of

Perkins v. Smith, 23 N. E. 21-3

the New York court of appeals held that the term "individual banker" was not the same as the term "private banker", as the private banker might include either a person or a corporation, while an individual banker would only denote a person. To the same effect see

People v. Doty, 80 N. Y. 225-8.

Under no other construction can meaning be given to both the words used, individual and citizens. If we are correct in this contention this would take out of consideration all of the corporations as to which the Auditor made the change in the rate of taxation and would leave only the assessments of the various individuals and as to them the Supreme Court of Iowa has held that the remedy as to any error in those assessments was by objection before the Board of Review and appeal to the District Court therefrom, and therefore the

petitioner having mistaken its remedy as to these assessments cannot now be heard in this court.

PROPOSITION VII.

Petitioner, Central State Bank is a state bank, organized under and subject to the laws of the State of Iowa, it therefore cannot claim any rights or privileges under Section 5219 of the Revised Statutes of the United States which applies only to National Banks. Petitioner has no rights here unless it can claim some violation of the 14th Amendment to the United States constitution. Petitioner is however a creature of the state and subject to its laws. It may be deprived of its entire existence by the State that created it, and its rights may be limited and abridged by the state at any time. Even if what the auditor did as complained in this case, in assessing individuals in competition with petitioner at a lower rate, was the law of the state and had been done pursuant thereto, there would be no violation of the constitution as to petitioner, because different classes of people can be taxed at different rates if there is a reasonable classification. The state in creating a bank may provide that if it decides to accept a charter and become a bank, as a condition thereto it shall be taxed at a certain rate, different from other persons or corporations and there would of course be no violation of the constitution. Petitioner as a state bank therefore has nothing to complain of.

The following cases support this proposition:

Layman v. Telephone Co., 123 Iowa 591-600.
Primghar State Bank v. Rerick; 96 Iowa 238-42-4.
Bells Gap Ry. v. Commonwealth, 134 U. S. 232.
Pac. Ex. Co. v. Seihert, 142 U. S. 339.
Giozza v. Tierman, 148 U. S. 567.

The Constitution of Iowa, Sec. 12 of Article VIII, is as follows:

> "Amendment or repeal of charters; exclusive privileges. Sec. 12. Subject to the provisions of this article, the general assembly shall have the power to amend or repeal all laws for the organization or creation of corporations, or granting of special or exclusive privileges or immunities, by a vote of two-thirds of each branch of the general assembly; and no exclusive privileges, except as in this article provided, shall ever be granted."

The provisions of the Code of Iowa of 1927 on this matter are as follows:

> "8376. Legislative control. The articles of incorporation, by-laws, rules and regulations of corporations hereafter organized under the provisions of this title, or whose organization may be adopted or amended hereunder, shall at all times be subject to legislative control, and may be at any time altered, abridged or set aside by law, and every franchise obtained, used, or enjoyed by such corporation may be regulated, withheld, or be subject to conditions imposed upon the enjoyment thereof, whenever the general assembly shall deem necessary for the public good."

The Iowa Supreme Court says:

> "That it is competent for the Legislature to adopt different methods for ascertaining the value of personal property, and to fix the situs of such property, is well settled. Therefore, it may provide for the taxation of corporations as provided in Section 1323 of the Code and fix the place for the assessment."
>
> *Layman v. Telephone Company*, 123 Iowa, 591-600.

In a case brought by an express company, claiming that the law, providing that the property of express companies should be assessed in the city where such company had an

office for the transaction of its business, was unconstitutional, because the property was not subject to taxation the same as that of individuals, the court held that the law was not unconstitutional and that it was not a special law. The court, in connection with the discussion of the question whether this was a special law and, therefore, unconstitutional, says, as follows:

> "Now, it would seem to necessarily follow, that if the act in question is a special law, for the reason that it prescribes a fixed and specific rule for the assessment of the property of express and telegraph companies, then Section 723 of the Revision which prescribes a fixed and specific rule for the assessment of the property of merchants, and Section 724, which prescribes another fixed and specific rule for the assessment of the property of manufacturers, must also be held to be special laws, and consequently, within the prohibition of the clause of our State Constitution relied upon by appellant's counsel, and quoted above. But these sections are not, and have never been claimed to be, in any sense whatever, special laws. Neither is that act a special law."

The court, in this connection, points out that the provisions of our Iowa Constitution differ from those of some other States where different rulings had been made by the courts, and especially points out that we have no constitutional provision that "the rule of taxation shall be uniform." Nor do we have a provision as in California that "taxation shall be equal and uniform throughout the State." The court, in this case, also cites the many differences in the methods of assessment of taxes against different classes of corporations and individuals which are not a violation of our constitutional provision. The court also incidentally points out in this case that double taxation is not unconstitutional.

United States Express Company v. Ellyson, 28 Iowa, 370-7.

The rule is well settled that the XIVth Amendment cannot be invoked here. The opinion of the U. S. Supreme Court is stated in *Bells' Gap Railroad v. Commonwealth of Penn.*, 134 U. S., 232. The Court, through Justice Bradley, on page 895 of Lawyers' Edition, Volume 35, says, in this case:

> "The provisions in the XIVth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulation, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State Legislature, or the people of the State in framing their Constitution. But clear and hostile discrimination against particular persons and classes, especially such as are of an unusual character, might be obnoxious to the constitutional prohibition."

The following are a few of the many decisions holding that the XIVth Amendment does not limit the taxing power of the State by imposing on it any rule of equality, so long as its classification is not wholly arbitrary.

Chester v. Penn., 134 U. S., 240 (33 L. E., 896).
Home Ins. Co. v. N. Y., 134 U. S., 594 (33 L. E., 1025).
Pac. Exp. Co. v. Sichert, 142 U. S., 339 (33 L. E., 1035).
Charlotte C. & A. Ry. Co. v. Gibbs, 142 U. S., 386 (33 L. E., 1051).
Jennings v. Coal Ridge Imp. & C. Co., 147 U. S., 147 (33 L. E., 117).
Giozza v. Tiernam, 148 U. S., 567 (33 L. E., 599).

In the case of *Insurance Ass'n. v. Gilbertson*, 129 Iowa, 658, the Supreme Court of Iowa says:

> "This rule, however, does not prevent the Legislature from selecting certain classes of persons, occupations or property for taxation according to its discretion, provided that its classification is not wholly arbitrary and unreasonable."

Thus it is seen that the burden is on plaintiff to show that our statutes or the deliberate and intentional acts of the taxing officers complained of discriminate between persons and property of the same class.

See also

Missouri v. Duckery, 191 U. S., 165-70.

It is true that the cases we have cited refer primarily to laws passed by the State, as distinguished from their administration, but the same principle would apply, if as claimed by the petitioner, the county auditor or the assessor and board of review had lawful authority to make the assessments complained of, against the competing corporations and individuals on the basis of moneys and credits. Their acts being as claimed legal and pursuant to authority granted to them by the statutes, would under such circumstances be the acts of the State just as much as a statute passed by the legislature. If therefore as stated in the cases above, the State can by direct statute assess different classes of taxpayers in different manners, without violating the constitution, it could indirectly through its proper officers decide which particular class should be taxed in one manner and which in another, without violating the constitution either state or national. And this reasoning would apply equally to a national bank, so far as its claims that the constitutions of both Iowa and the United States have been violated are concerned. It is admitted that all classes of banks, Na-

tional, State and Savings are assessed and taxed on the same basis. There is absolutely no showing that the corporations and individuals whose assessments are complained of were so similar to banks that to put them in another class for purposes of taxation would be a purely arbitrary classification. In the absence of such a showing the petitioner State bank cannot claim a violation of the constitution.

PROPOSITION VIII.

In no event could the erroneous or even the illegal individual acts of one or more taxing officials become a violation of the constitution so that it could be reviewed and relief obtained by appeal or certiorari. The County Auditor could have corrected the error he made but the petitioner never asked him so to do. The Code of Iowa, 1927, Section 7149, provides as follows as to the power of the Auditor:

> "Section 7149. Corrections by auditor. The auditor may correct any error in the assessment or tax list, and may assess and list for taxation any omitted property."

and this has been the law of the State during all of the period covered by this suit, and that is all the power that he has.

The Supreme Court of Iowa in the suit of

Ft. Madison Security Co. v. Maxwell, 202 Iowa, 1346

has held that the Auditor has nothing to do with deciding whether certain securities shall be assessed as moneys and credits or as moneyed capital. The Court in so deciding says:

> "Under these provisions of the statutes, in force at the time of the assessments in question, it was clearly the duty and function of the assessor, in the first instance, and of the board of review, to determine whether given money and securities belonging to a corporation other

than a bank or trust company were to be listed and assessed as moneyed capital, under the provisions of Section 1310, or were to be considered in determining the value of the shares of stock to be assessed to the shareholders, as provided by Section 1323. * * *

"Even where, as would appear to be the case in the assessments in question, and as is now required by Section 7008, Code of 1924, the value of moneys and credits belonging to such a corporation is assessed to the corporation, the question of whether given property is to be assessed as moneys and credits or moneyed capital is to be determined by the assessor, subject to review and correction by the board of review. * * *

"We think it clear that the auditor did not have power, under Section 1385-b, to change the classification and assessment of appellant's property from moneys and credits to moneyed capital."

The Supreme Court of Iowa has held in the case of

First Nat'l. Bank of Burlington v. Webber, 196 Iowa, 1155

that the County Auditor had no authority to correct the records as to the assessment against a bank so as to change the assessment made by the assessor and the board of review, and that where he had done so his act was such an illegality that it could be corrected by certiorari to the District Court.

The Supreme Court of Iowa has held in the case of

Ridley v. Gauty, 85 Iowa 418

that the auditor could be compelled by mandamus to make corrections in the tax list.

The Supreme Court of the United States has held that the unauthorized act of an official, especially where it is expressly contrary to law, and where it could have been corrected by proper application to the state courts, which was not done, does not raise a constitutional question or a federal question under the constitution. See

Barney v. City of New York, 193 U. S. 430-8.

In that case this Court says:

> "Controversies over violations of the laws of New York are controversies to be dealt with by the courts of the state. Complainant's grievance was that the law of the State had been broken, and not a grievance inflicted by action of the legislative or executive or judicial department of the State; and the principle is that it is for the state courts to remedy acts of state officers done without the authority of or contrary to state law."

The plaintiffs have reiterated, both in their pleadings and in their objections, and in their questions and in their arguments, that "The taxing officers of Polk County, State of Iowa, did, in each of said years, habitually, wilfully, intentionally, systematically and generally" assess their competitors in the alleged improper manner complained of. Why do they keep repeating this sentence in this identical form? The reason is that it is the mystic shibboleth which the United States courts have fixed upon, in order to be able to say that the *administration* of the law, as distinguished from *the law itself*, is in contravention of the provisions of Section 5219 of the Statutes of the United States. This shibboleth is equivalent to the courts saying that there must be conspiracy and collusion among the taxing officials to accomplish the thing complained of. It presupposes an admission that the act of one taxing officer alone, or the sporadic acts of several taxing officers combined together, would not be sufficient, even in the view of the Federal courts, to constitute a violation of Section 5219. Of course, as to the state courts, this shibboleth does not apply at all. That is not the test in the state courts as to whether the action of officials, if it ever can be unconstitutional, is unconstitutional or raises a constitutional question. This is strictly a catch word or phrase of the Federal courts as bearing upon competition of national banks, and, of course, it is not a test of constitutionality at all. It is merely a test of whether the administration of the law, as distinguished from the law itself,

is in conflict with Section 5219. We do not have to worry then with this phrase with regard to the state banks. Taking up the national banks, however, let us see whether, in this case, they have brought themselves even within their own definition. The only assessments as to which all of the taxing officers apparently agreed was the assessment as against moneys and credits in the hands of individuals. The Assessor and the Board of Review classified them as moneys and credits and the Auditor transferred them to the tax list of Polk County as moneys and credits and they were taxed on the five mills basis. There was no collusion or conspiracy about it. These officers just figured that that was what the law said to do and they did it. However, the individual taxpayers no longer cut very much figure in this suit. As we understand the plaintiffs, at least in their oral argument in the District Court, they have practically abandoned their position that the taxation against these individuals would, either in amount or for any other reason, raise the question of material competition with the national banks, and the Supreme Court of Iowa has held that their remedy as to these was by appeal, so there is no need to discuss that further. As to the corporations, however, claimed to have been in competition with banks, there was no agreement among the tax authorities. The Assessors and the Board of Review taxed them all as corporation stock which would have resulted in taxation at a higher rate than the moneyed capital rate. The auditor changed these from corporation stock to moneys and credits. Certainly, this would not indicate anything, either habitual, intentional, systematical, or general, on the part of the taxing authorities, as they seem to have been divided among themselves as to what should be done. The major portion of them wanting to do it in the manner in which the plaintiffs claim was correct, and one individual only, without any apparent authority of law, desiring to do

it the other way. This would seem to us to fall far short of such an administration of the law, which, even under the plaintiff's own definition, would come in conflict with Section 5219.

In addition to this, the Auditor testified that, in making the changes and classification, he acted in good faith and in the belief that he was assessing these corporations as they should be assessed under the law. This would show that there was no habitual, wilful, intentional, systematical or general attempt, on his part, to violate the law, or to create improper discrimination as against the plaintiff national banks.

It is clear, therefore, under the above authorities that there was no violation of the Constitution or of Section 5219 on account of the illegal acts of the Auditor in changing the assessment of the corporations. The assessment of the individuals is no longer in question here as the Supreme Court of Iowa in its opinion in this case has held that the remedy of the petitioner in such a case was by appeal from the board of review and that being a question of remedy or State practice the United States court will not interfere with the decision of the Supreme Court of Iowa on that point.

PROPOSITIONS IX AND XI.

Adjudication, Laches and Estoppel.

The doctrine of *res adjudicata* applies as well to tax proceedings as to ordinary litigation between individuals.

Blondel v. Woodbury Co., 212 N. W., 335.

Beginning on page 148 of Appellees' Denial of Abstract and continuing to page 271 of the same being pages 1214 to 1316 of the printed record in this court are set out the pleadings that were offered as evidence in various prior

cases brought in the State Courts by the appellant banks and which we claim constituted an adjudication. In addition to these the petitioners, Iowa National Bank and the Central State Bank brought injunction suits in Federal Court to prevent the collection of these very taxes and raised all the questions raised here and later dismissed the suits. See Appellants' abstract, page 695, being page 825 of printed record here.

The first case is *Iowa National Bank v. Barton, Mayor,* set out on page 166 of denial of abstract being page 1228 of the printed record in this case. This was an appeal from the Board of Review on account of assessment made as of January 1, 1920. The objections raised in this case were not only that they did not deduct United States Bonds and stock in the Federal Reserve Bank, but also raised the very question raised here, that stock of the National Bank was assessed at a greater rate than assessed upon other money capital in the hand of individuals within the state. In this case a stipulation was entered that it was to follow the case of the *Des Moines National Bank v. Fairweather,* then pending in the Supreme Court of Iowa and pursuant to that stipulation the case was dismissed. As this case was decided it was a complete adjudication of the questions raised in the present suits in that the same questions were raised and the case in accordance with the stipulation was decided against the bank and dismissed with prejudice.

The next case is *Central State Bank v. Barton,* beginning on page 179 of Appellees' Denial of Abstract being page 1237 of the printed record in this case. This case also involved the assessment as of January 1, 1920. This was also an appeal from the Board of Review and the only objection made was that there had not been deducted certain Liberty Bonds and stock in the Federal Reserve Bank. This case was governed by the same stipulation that it should follow the *Des Moines National Bank v. Fairweather* and pursuant to

that stipulation it was decided against the Central State Bank and the cause dismissed. Here again is an adjudication not only of the questions they did raise, but the questions they might have raised, including those they have raised in the present suits.

The next suit is found on page 223 of amended abstract being page 1270 of the printed record here, and was brought by the *Iowa National Bank v. Barton, Mayor*, and was an appeal from the action of the Board of Review with regard to the assessment made as of January 1, 1921. On this appeal they not only raised the question that the Board should have deducted certain Liberty Bonds from the bank's assessment, but further on page 227 being page 1279 of printed record, they raised the question that the assessment was erroneous and contrary to United States Statutes because there was moneyed capital in the hands of individuals in competition that was taxed at a lower rate. In this suit all of the questions raised in the present suit were pleaded and under a stipulation that the case was to follow the result in the case of *Des Moines National Bank v. Fairweather*. On the decision of the latter case the Iowa National Bank case was dismissed. This was a complete adjudication of all the questions raised in the present suits because the identical questions were raised in that suit and were decided against the Iowa National Bank.

The next suit is found on page 245 of Appellees' Denial of Abstract being page 1287 of the printed record here and is brought by the *Central State Bank v. Barton, Mayor*, and is an appeal from the Board of Review on account of its refusal to deduct from the assessment made of January 1, 1921, certain Liberty Bonds and War Savings Stamps and Stock in the Federal Reserve Bank owned by the bank. This suit also followed the case of *Des Moines National Bank v. Fairweather* and after the decision of that case was dismissed and constituted an adjudication against the Central

State Bank on all of the questions that might have been raised on the assessment as of January 1, 1921.

In addition to these suits the Iowa National Bank, now the Iowa-Des Moines National Bank, and the Central State Bank each brought a suit in the United States District Court for the Southern District of Iowa asking an injunction against Allen Munn as County Treasurer of Polk County, Iowa, to prevent him from collecting the identical taxes which they are now seeking in this proceeding to recover. These suits were brought at the same time as the suits of the Des Moines National Bank against Allen Munn, County Treasurer, and the petition filed and questions raised by Iowa National Bank and Central State Bank were identical with those raised by the Des Moines National Bank in this *Munn* suit, which was later carried to the Circuit Court of Appeals and decided against the Treasurer, being the case that is claimed by the petitioner in this case to be an adjudication as against the respondents. For some reason, however, the Iowa National Bank and the Central State Bank neither one of them prosecuted its suit to a conclusion but voluntarily dismissed the same. If this does not constitute an adjudication it certainly would constitute estoppel and laches on the part of these peitioners. The respondents surely had a right to assume, when suits were commenced raising these very questions and were later dismissed after the respondents or those who represented them had gone to the expense of procuring counsel and preparing to defend the same, that the petitioners had abandoned their claims as to illegality of the taxes and had acquiesced in the action of the respondents and were going to pay the taxes. And as a matter of fact the record shows that they did later pay these identical taxes, in some cases with protest and in some cases without. The record showing that the respondents have gone ahead and disbursed the taxes to the various spending bodies, relying, or certainly with the right to rely, on the acquiescence of these petitioners and the

dismissal or adjudication against them of the various suits they brought, it would not now be fair and equitable to require the respondents to collect back from the various taxing bodies this very money which has been disbursed as above outlined.

In this connection and as bearing on this question of estoppel and laches we would also call the Court's attention to the fact that all, or practically all, of the assessment rolls of the petitioners that were introduced had written upon them a statement signed by an authorized officer of the bank in the following form or in equivalent form: "Iowa National Bank agrees to pay the taxes justly and legally due on the assessment made to the stockholders of this company for the year 1920." See Appellant's abstract, page 658, now Page 787, l. 34 of the printed record here. It is to be noted too in connection with this agreement to pay there was no statement or claim made in any case as to any objections that was being made by the bank to the assessment.

We contend, therefore, that these suits or appeals constituted adjudications against the banks with regard to the taxes involved in each case the same being most of the taxes involved in these cases. With regard to the two or three cases that were dismissed without prejudice, if they were not an absolute adjudication they certainly created an estoppel which would prevent the banks in this late day from claiming they had objections other than they raised on these appeals. This is especially true in view of the fact that the officers of Polk County and the other taxing bodes had a right to assume, and did assume that these were all of the questions that the banks had in mind. This particular question especially of deduction of Liberty Bonds having been decided against them in the case of *Des Moines National Bank vs. Fairweather* and all of these cases being dismissed and the taxes paid, the taxing officers had a right to assume that this was a closed incident and they could distribute the money

and act on the assumption that the taxes were properly levied and did not have to be refunded; and they expended the money on that basis and in that belief.

The following cases support our contention.

Where a person voluntarily listed his property in a certain county and voluntarily paid the tax and the taxing body incurred debts, made estimates and paid out money relying on the assessment the taxpayer is estopped to recover it back. The payment of taxes under mistake of law will not entitle recovery under Iowa statutes. This was held in the case of

Slimmer v. Chickasaw Co., 140 Iowa 448-53.

The following cases support the proposition that a former judgment is a bar or estoppel against a prosecution on the same claim or demand between the same parties and concludes them not only as to what was offered to maintain or defeat the claim but as to any other admissible matter that might have been offered.

Pierce v. National Bank of Commerce, 268 Federal 487.
Taylor v. Taylor, 240 S. W. 6.
Cressler v. Brown, 192 Pac. 417.
Reinkey v. Wilkins, 179 N. W. 751.

In the case of

Elder v. Fink, 180 N. W. 542

the Supreme Court of Minnesota held that a final judgment in a former action between the same parties is conclusive as to every matter which might have been properly litigated in that action and is a bar to a subsequent action although in form and remedies sought the two actions are different.

In the case of

Village of Winnetka v. Handy, 128 N. E. 805

the Supreme Court of Illinois held in a tax assessment case that in proceedings for confirmation of a supplemental as-

sessment for local improvements objections to the validity of the original assessment could not be raised since the judgments confirming original assessments were conclusive as to everything that was or could have been raised at that hearing.

The Supreme Court of Iowa has held in the case of

Farmers Insurance Co. v. Linn County, 202 Iowa 444

that where a person who is the chief stockholder in a corporation has the property of the corporation taxed under the consolidated levy the corporation cannot later have a refund on the theory that it should have been assessed only five mills. That that is not such an erroneous assessment or tax that would entitle them to recover it.

See also the case of

S. Dak. Sec. Nat. Bk. v. Twinde, 217 N. W. 542.

PROPOSITION X.

Protest Not Sufficient.

It must be admitted that the taxes in question were not illegal and void within the definition of these terms by the Supreme Court of this state. If this is true, payment of the tax without a definite protest waives any right to complain and the taxpayer is estopped from contesting the validity of the payment. The payment of merely an erroneous assessment, if it is to be recovered subsequently, must be under a protest that is sufficiently definite to point out in a general way, at least, why it is claimed the tax is invalid. Few of the protests, as shown by the record in the case at bar, point out or attempt to even indicate in what respect it was claimed the tax was erroneous or illegal. The tax officials were left entirely to draw upon their own imagination for reasons to sustain the protest. Certainly such a protest is not sufficient

to authorize a taxpayer to subsequently bring an action for the recovery back of the taxes paid. In most cases no protest whatever was filed and the receipt was merely marked "Paid under protest" by the Treasurer. It isn't even shown who was protesting or what they protested about.

The right to recover taxes exists only when taxes are paid under protest and on compulsion to prevent seizing of goods.

Hawkeye Co. v. Marion, 110 Iowa, 468.

The only exception to this rule is that where the tax is *absolutely void* recovery might be had under the refund statute, even though paid without protest, if the illegality was discovered "after he had paid the same."

In the case at bar no one claims the tax is void, but only that it is too much; and also the petitioner admits that it knew all about the illegality before and at the time that it paid the tax.

In one or two cases no protest was made at all when the taxes were paid. In many other instances, the only protest was a statement written upon the tax receipt by the Treasurer and not by the taxpayer, stating that it was paid under protest. No details were given as to the reason for the protest. In a few cases there were filed with the Treasurer written protests, giving the reasons therefor. None of the protests which did not fully set out the reasons were such protests as the law would recognize, as the person protesting must point out to the tax authorities his objections and not leave them to guess as to what their objections are, or on what particular ground they claim the tax is erroneous or illegal. One of the United States Supreme Court cases cited by plaintiffs makes the remark that plaintiffs could not be expected to hunt through the tax records and find out who had been erroneously assessed. If this is correct, it would certainly apply just as strongly the other way, and the tax-

ing authorities, on a protest being made without any reasons annexed, could not be expected to look all through the records and pleadings to find out what errors there might happen to be to which the banks might be objecting. The volume of evidence in this case shows what an impractical proposition it would be to require the taxing authorities to make a guess, or to assume that any one could imagine that most of the assessments introduced in evidence by the plaintiffs would be considered as being in competition with banks. This would require a more vivid imagination than most taxing officers possess. In fact, only such an imagination as is possessed by some banks and their attorneys. See pages 869 to 871 of appellant's abstract, on pages 999 to 1003 of the printed record for form of protests.

Even if the protests had pointed out the objection of the banks that there were persons and corporations in competition with them who were being erroneously assessed, this would not be sufficient for the very reasons pointed out above, unless the objectors also pointed out the very individuals, or, at least, some of them, that they claimed were being so erroneously assessed. In no instance did the petitioner bank, in its protests, give the names of any individuals or companies who, in their opinion, were in competition with them and illegally assessed. The only place where this was done was in one or two of the appeals from the Board of Review, in which appeals the bank raised the objection that their competitors were not being properly assessed and named three or four of their competitors. In those instances, however, the suits and appeals were decided against the bank, so that their claim, in those cases, has been adjudicated against them. Even on the witness stand the bank officers were unable to name more than one or two of their alleged competitors. And in some instances could not even name one.

The rule seems to be that unless the tax is absolutely void, in order to recover back after it has been paid, the payment must have been made under protest and under a protest pointing out the very objection relied upon.

It is admitted by the petitioner bank, in its pleadings, that the tax officials of Polk County had authority to levy some tax upon their property. The only dispute is as to the amount of it. The tax, therefore, was not illegal or void. If there was any wrongful tax levied, it was merely through mistake in judgment of the taxing authorities. It was not, therefore a tax that was erroneous or illegal within the meaning of Section 7235 of the Code of Iowa, 1924, which is the section under which petitioner brought its suit.

PROPOSITION XII.

The Plaintiff Banks Have Not Come Into Equity With Clean Hands.

1.

The evidence shows, without contradiction, in fact, the officials of the plaintiff so testified, that all of the state banks assisted their customers in evading taxation as to mortgages sold to them by the banks. The method in which this was done was that the customer would not record his assignment. In some instances, it even remained in the hands of the bank itself, and, in many instances, all papers connected with the loans remained with the bank. In this way, there was nothing of record to show that the customer was the owner of this particular mortgage. Later, in order to assist the customer in keeping from the record anything that would indicate that he was the owner of the mortgage, and, knowing or suspecting, as they admit, that the customer was doing this for the purpose of evading taxation, the banks had, at

the request of the customer, released the mortgage on the record, although they had no longer any interest in the matter and knew they had no right to so release it. It was shown, in several instances, that the customer, to whom these mortgages were sold, did not return them for taxation. And the banks knew, or at least suspected, that this was the situation. It is true neither of the national banks engaged in the reprehensible practice for the simple reason that they owned and sold no real estate mortgages. However, the evidence does show that the Valley National Bank used the Valley Savings Bank as really a part of its own organization and, for certain purposes, and in the same way, the Iowa National Bank used the Des Moines Savings Bank & Trust Company, in connection with its business and for carrying on certain lines which the national banks themselves could not carry on, and both of these subsidiary state banks were officered and engineered by the same officers, although not always in the same position, as the national bank. The officers, therefore, of both the national banks connived at and assisted their subsidiary state banks in this practice of helping their customers evade taxation and they are, therefore, tarred with the same stick as the state banks and do not come into this case with clean hands. They are seeking here to recover back taxes paid by them when, at the same time and down to the present, they were assisting their customers to evade taxation and were thus defrauding Polk County and the subsidiary taxing bodies out of a large amount of taxes.

2.

The evidence further shows that both of the petitioner banks, either directly or indirectly, through an organization known as the Des Moines Clearing House Association, combined, contrary to the Statutes of Iowa, for the purpose of

raising the price of their commodity which they dealt in or decreasing the price of the commodity which they were purchasing, by making regulations through the Clearing House, which were observed by all the banks, decreasing the amount of interest that would be paid upon savings bank deposit, and, in addition thereto, making a charge for carrying small accounts, thus refusing the use of the bank to individuals of small means, contrary to public policy, and contrary to the purposes of the law under which they were organized, and the advantages of which they took to themselves. And such action was also illegal, because contrary to the Statutes of the State of Iowa as to restraint of trade and combinations. That the plaintiff banks, having thus violated the laws of the State, and having refused to carry out the purposes for which they were allowed to be incorporated by the State, have forfeited the right and are not in the position to now claim that they should recover back from the State, or from some of its branches, any amount of money which they may claim to have been erroneously collected from them, until, at least, they themselves are willing to do equity and abide by the laws of the State.

THE PLAINTIFF COMING INTO EQUITY MUST COME WITH CLEAN HANDS.

In discussing this proposition, it is necessary to call the Court's attention to what might be termed the "atmosphere" of this case as well as to specific evidence.

While seven cases were tried on the same testimony, each case stands separately and upon its own record. "It is stipulated * * * in each of the seven cases * * * that the cases shall not be consolidated, but that the testimony shall be taken at one time *insofar* as applicable shall apply to all the * * * cases * * *. Separate judgments and decrees shall be rendered in each case." (Tr. 4-5.) (R. 133-4.) It is, there-

fore, conceivable that one case can be successful and another fail.

We, therefore, want to call to the attention of the Court the specific things in the actions of each of these plaintiffs, which we believe conclusively establish their want of clean hands and that they positively have besmirched themselves with inequitable conduct and by that conduct created the situation such as they in their sanctimonious virtue *complain as unbearable* and *discriminatory*.

CENTRAL STATE BANK.

Outside of those considerations which are applicable to all the plaintiff banks, there is special testimony relative to each bank as to its attitude and conduct. The spokesman for the Central State Bank is its president (Tr. 2769), Grant McPherrin, who, as cashier in 1913, vice president in 1915, and president in 1921 (Tr. 2769) knew all about its business. He tells us that every bank, as a matter of practice, would sell a mortgage, make an assignment executed by the bank and the assignment would not be placed of record but at the expiration of the term of the mortgage, the release of the mortgage would be made by the bank. That was done as a matter of practice by the Central State Bank in the years 1918, 1919, 1920, 1921 and 1922. (Tr. 4684-5). "Many of the buyers of the mortgages, by failing to record their mortgages, were in truth and in fact dodging taxes", and Mr. McPherrin knew they might be or they might not be. (Tr. 4689.)

IOWA NATIONAL BANK AND DES MOINES SAVINGS BANK & TRUST COMPANY.

Mr. Clyde E. Brenton, its vice president, gave the following testimony:

Q. Do you happen to know whether or not it was a custom of your bank, the Des Moines Savings Bank & Trust Company, after it had sold a loan to an individual and made an assignment to the person who purchased it, to later release the mortgage of record in the name of the bank at the request of the person who had purchased the mortgage—or do you know as to that?

A. Very little, except that if we sold a loan and assigned it and the assignment had not been put of record and they came in and asked to make a release of the mortgage and returning us the assignment, we would do so.

Q. You would do so?

A. We would not force them to file their assignment and file the release.

Q. Nor would you force or investigate to see whether or not they had returned that loan for taxation, I assume?

A. We did not.

Q. Of course, you knew, did you not, that that was one method of dodging taxation used by certain people so inclined, that is not recording the assignment of the mortgage and then get the original mortgagee to release it later?

A. That would be up to the man making his own assessment. A great many of these people had offsets. We had nothing to do with their listing of moneys and credits or any of their other affairs.

Q. I don't think that answers the question, Mr. Brenton.

A. I suspected that that might have been done but we were not a party to it.

Q. But I understood you to state that you did not bother to investigate before you would release the mortgage at the request of the party to whom you had sold it,

about whether the mortgage had been returned by taxation or whether it had not.

A. We did not investigate. (Tr. 4864-4866.) (R. 789.)

It now appears unquestionably and absolutely undebatably that every one of the plaintiff banks who now complain that others are not taxed as they are taxed, participated in and were parties to an organized, common, deliberate method of preventing the public from being advised as to assessable property and thereby to defeat the public from collecting taxes from the persons who legally and under their honor were duty bound to pay. If that is not improper conduct, it possibly cannot be improper conduct on the part of the county to fail to exact taxes from taxpayers and that is the thing the plaintiffs complain of and upon which their whole suit relies. In other words, the plaintiffs complain that the taxing bodies have not been exacting their full measure of revenue from potential taxpayers and that, therefore, the plaintiffs are entitled to equitable remedy because they have been imposed upon. Now it appears from the plaintiffs' own testimony in each particular case that the public has been defeated in its efforts to collect public revenue because of the conspiracy or silent but active co-operation on the part of the plaintiff banks with tax dodgers.

It is no answer for the plaintiffs to say that that misconduct on their parts does not have anything to do with the failure of the taxing bodies with relation to the rate of levy because these acts are inseparable. The plaintiffs in each case complain that they are denied the equal protection of the law because others are not required to pay the proper amount of taxes. That particular act, to-wit: the failure to collect the proper amount of taxes was in part due to the illegal, immoral conduct of the plaintiff banks and if in any measure they have contributed to the situation of which they

complain, their complaint will not reach the listening ear and the Court of Conscience will refuse to extend its arm to assist the complainant.

There is another phase of this question which is properly presentable to the Court, both under the question of failure on the part of the plaintiffs to do equity and as a question of laches and that is: THE PLAINTIFFS KNEW OF THEIR COMPLAINT AS TO METHOD OF TAXATION BUT SAT IDLY BY, PERMITTING THE TAXING BODIES TO LOSE THE REVENUE WITHOUT THE ASSISTANCE OF THE PLAINTIFFS, AND THE PLAINTIFFS, INSTEAD OF PILING UP A MASS OF CLAIMS, WERE IN EQUITY DUTY BOUND TO ASSIST THE COMMUNITY TO PREVENT A LOSS INSTEAD OF AGGRAVATING A LOSS.

It is undoubtedly, even under plaintiffs' contention, the purpose of the statutes of Iowa and consented to by Section 5219, that all the plaintiff banks and competing capital should pay taxes under the general millage levy. The plaintiff banks complained not that they paid too much taxes but that others paid too little and seek the remedy not of compelling others to pay the full amount of taxes but to return to the plaintiffs what they deem a disproportionate excess.

The plaintiffs have no basis of complaint except in equity and if the basis of complaint is that the other taxpayers did not pay enough taxes, it should have brought its action when the remedy could have been obtained to compel the proper levy against the voting taxpayer rather than to sit by and permit the loss of taxes to accumulate and then on the other taxpayer's wrong, receive a reduction rather than to create a proper revenue for the taxing bodies.

Further, each institution knew the taxing bodies were levying and spending the moneys as and when received and incurring obligations in anticipation of the amounts to be received and probably making improvements that otherwise could not be undertaken.

CENTRAL STATE BANK.

Mr. McPherrin, the president, testified that it was brought to the bank's attention in 1919 that there was a question about the taxes and in 1919 the bank believed it had objections to the taxes and in 1920 and 1921 and 1922, but instead the bank paid the amount required for taxes set up in a reserve, and did not pay the taxes until November 30, in 1923. The bank knew that the taxes were levied for immediate and anticipated expense and that the moneys received would be distributed in governmental expense and that the money paid would be long distributed prior to September 14, 1925, the date the law suit was begun. (Tr. 4445-4449.) (R. 753.)

IOWA NATIONAL BANK AND DES MOINES SAVINGS BANK AND TRUST COMPANY.

Mr. Clyde Brenton, an officer, testified: As far back as January 1, 1919, it was discussed among the officials of the bank that the bank was being illegally assessed in that there were other people the bank considered in competition who were not being assessed at the same rate. (Tr. 4895-4896.) (R. 787.)

PROPOSITION XIII.

The Suits Should Have Been Brought by the Stockholders.

The proper plaintiff to recover taxes is the person who is ultimately entitled to the money.

37 Cyc., 1187.

In a suit by a national bank to recover back taxes paid on its real estate, where the real estate had not been deducted

from the value of the shares, held the wrong was to the stockholders and the banks could not maintain the suit.

Board v. First National Bank, 57 N. E., 728.

Payment of tax on shares by the bank is, in effect, payment by the stockholder.

Primghar Bank v. Rerick, 96 Iowa, 238.
Head v. Board of Review, 170 Iowa, 300.
First Nat'l Bank v. Council Bluffs, 182 Iowa, 107.
Andrew, Supt. v. Munn, Treas., 218 N. W. 526.

A state law authorizing persons against whom claim is made to bring action against claimant, to determine claim, held, to give bank no right to bring action to enjoin County Treasurer from collecting portion of taxes assessed upon its stock.

First National Bank v. Patterson, 176 Pac. 498.

Payment of taxes on a stockholder's shares of stock is in effect the declaring of a dividend by the bank.

Redhead v. Iowa National Bank, 127 Iowa 572.

A consignee cannot maintain an action to recover back taxes paid by him on goods held on consignment.

Stickney v. Bangor, 30 Me. 404.

The taxes on the shares of stock are the taxes of the stockholders and can only be recovered by them.

The shares must be assessed as the property of the owner, and the payment of the shares by the bank is, in effect, the payment by the stockholder.

Primghar Bank v. Rerick, 96 Iowa, 238-242-4.

In a case holding that a county treasurer could not recover taxes on the stock of a bank, from the bank, unless it

was shown that the bank had property of the stockholders in its possession, our Supreme Court says:

> "A stockholder in a national bank cannot be taxed upon his stock at a greater 'rate than is assessed on other moneyed capital in the hands of individuals'. Code Section 818. This authorizes the stockholder to deduct from the cash value of his stock the amount of his valid debts."
> *Farmers Nat'l Bank v. Hoffman*, 93 Iowa, 122-4-5.

Though the bank may pay the taxes, this is done, not on its behalf, but for the shareholders.

1st Nat. Bk. v. Council Bluffs, 192 Iowa, 107-14.

Though the bank may pay taxes, this is done, not on its behalf, but for the shareholders. Neither the corporation nor its property is assessed.

Head v. Board, 170 Iowa, 300-5-6.
Sec. 7235, Code 1924, as to Refund of taxes.

We have already pointed out the authorities holding that it was the stockholders who were assessed and not the banks, and that therefore the stockholders are the ones who are entitled to recover. We would like to apply a little further the law as laid down in the cases, to the facts as developed in the cases at bar. The lists of stockholders of the various banks in the various years will be found beginning on page 124 of Appellees' Denial of Abstract and continuing to page 146 now pages 1197-1205 of the printed record. We will not take the time or space to go through the statements of all of these banks in order to show that there was a material number of stockholders who owned stock at various times during the period that these taxes were paid who are not now stockholders in the banks. A statement as to the stockholders of the Central State Bank is typical of all of them. Taking first Exhibit "Z-204" which is a list of the stockholders of the Central State Bank as of September 15, 1925, more than a

year before these suits were brought, in that list there were all together approximately one hundred and five stockholders. Forty-four of these one hundred and five stockholders owning six hundred and one shares of stock out of a total of twenty-five hundred shares were not stockholders on January 1, 1919. Turning to Exhibit "Z-199" the list of the stockholders whose stock was assessed as of January 1, 1919, we find that 20 stockholders out of 76 who owned seven hundred and seventeen shares out of a total of twenty-five hundred shares in 1919 were not stockholders in 1925 or when the suit was brought. In other words, almost one-third of the stock that was outstanding on January 1, 1919, was not owned when this suit was brought by the parties who owned it in 1919. A checking through of the statements of the other banks would show practically the same situation so that even if we should be wrong in our contention that the banks cannot represent even the stockholders who were stockholders in 1919 and the other years when the taxes were paid, and who were still stockholders when the suits were brought, we are certainly right in our contention that the bank cannot by any stretch of the imagination represent the stockholders who are no longer connected with the bank. And the above evidence shows that the stockholders who are no longer connecfed with the bank are a substantial number and represent a substantial amount of the capital stock.

Nor is it reasonable that the banks [redacted]d claim or pretend to represent the stockholders who actually paid the taxes. The impracticability of the theory, that the banks represent stockholders who are no longer connected with it, has been thoroughly illustrated by what has occurred during the pendency of this very case.

The Iowa National Bank and the Des Moines Savings Bank and Trust Company in the first instance consolidated with the Des Moines National Bank and organized an ap-

parently new corporation under the name of Iowa-Des Moines National Bank. On top of this, however, there was another amalgamation or *quasi* consolidation, by which the stock or at least a majority of the stock of the combined bank was sold to a corporation known as the Northwest Bancorporation. The understanding being, according to the newspapers, that any stockholder in the Iowa-Des Moines National Bank could exchange so many shares of his stock for so many shares in the Northwest Bancorporation. If, therefore, the Iowa National Bank and the Des Moines Savings Bank are entitled to recover instead of the stockholders either for themselves as corporations or for the benefit of the present stockholders, the money when obtained would have to be paid over by them, at least more than one-half of it, to the Northwest Bancorporation, a corporation which had nothing to do with the matter at the time when the taxes were levied and paid. We merely use these recent events as an illustration to show what a precarious position even the present stockholders of these banks would be placed in if it should be found that the banks are entitled to recover these taxes for themselves rather than for the stockholders. In other words, the acts of these banks themselves since this suit was brought has conclusively shown that the banks' claim that they are entitled to maintain these suits as banks cannot be maintained. Nor can the proposition that they have a right in some mysterious way to represent even the present stockholders in the bank be followed out to a logical conclusion without coming against insuperable obstacles. How can the court be assured that the consolidated bank will pay over to the former stockholders of the former Iowa National Bank the money recovered by it for them in this case? And if they do not so turn it over how are the respondents in this case protected from subsequent suits by the stockholders themselves to recover the same taxes?

As heretofore briefly pointed out, the evidence shows definitely that during these years all of the banks declared dividends in each year over and above the amount that they paid out for taxes, in addition to that passing large amounts of undivided profits to surplus. So that it conclusively shows that the taxes in each year were paid out of the undivided profits which would otherwise have been declared as dividends to the stockholders.

The banks therefore had no claim against the stockholders for any refund as the taxes were paid in the first place out of the money of the stockholders which would otherwise have gone out to them in dividends or been placed in the surplus.

The tax is levied against the stockholders upon their shares of stock. It has repeatedly been held that this is not a tax against the bank, but is only a tax against the stockholders. The stockholders are the ones primarily liable for this tax. The banks are only secondarily liable to the extent that they have property belonging to the stockholders in their hands. If the taxes, therefore, were erroneously assessed and paid, the money so paid belongs to the stockholders and could only be recovered by them, or their assignee. There is no claim in this case that the right to recover back these taxes had been assigned by any of the stockholders. The evidence shows that many people, who were stockholders when the taxes were assessed and paid, were no longer stockholders at the time this suit was brought, or at the time the claim was made to the Board of Supervisors to recover back the taxes. Even assuming, for the sake of the argument, that the bank might represent the stockholders, who were stockholders when the taxes were levied, and who are still stockholders, it certainly could not represent the stockholders who paid the taxes years ago and are no longer stockholders in the bank. There is, therefore, a defect in parties plaintiff, at least to this extent.

Even though these taxes were paid by the banks originally, it has, in effect, been refunded to the bank by the stockholders, for the simple reason that the bank paid the taxes out of their undivded profits which would otherwise have been declared as dividends or passed as surplus. In either case, the stockholder paid the taxes, because the book value of his stock was decreased exactly by the amount of the taxes paid. When he sold his stock, he sold it on this depreciated basis, and, therefore, there has never been refunded to him the amount which he paid for these taxes, either by the bank or by the person who purchased his stock. The right to recover these taxes, therefore, if they have been erroneously taken away from him, rests in the stockholder alone. The evidence shows that all of these payments were made during a period when they paid out large dividends, or put large amounts to the surplus during the same period, more than enough to have paid these taxes. All the property of the bank, therefore, over and above its debts and liabilities, belonged to the stockholders and it was out of this balance, existing over and above its liabilities, that the bank, in each instance, paid the taxes. The taxes were, therefore, paid out of the property of the stockholders and it is mere quibbling to say that, because the bank did not declare the larger dividend, in the first place, and then deduct the taxes out of the dividends, the taxes were not paid by the stockholders. The officials of the banks themselves admitted that the method pursued, arrived at exactly the same result as far as the book value of the sharea was concerned, as if they had set aside a fund for paying taxes, which was made up out of deductions from the dividends declared to the stockholders, or as if they had declared the dividends and each stockholder had paid back enough to pay the taxes.

PROPOSITION XIV.

Would the Five Mill Levy, If Properly Applied to Banks, Have Produced Less Taxes Than the Basis Upon Which They Were Assessed?

If the plaintiff banks had been assessed five mills on the dollar on all of their moneys and credits, as shown by the evidence in this case, the tax would have been much more than the amount that they were compelled to pay under the assessment complained of.

The amount actually paid by the banks, on their present assessment, is much less than a five mill assessment, without deduction of debts. Therefore, individuals, who had no debts to deduct, paid a higher rate than the banks. There is no showing that many of the individuals, whose assessment rolls were offered, had any deductions. Therefore, their rate was higher than the rate at which the banks were actually taxed, because, in the method provided by the statute and under which the banks were assessed, they have a right to deduct, not only all of their debts, but all of their real estate and their amount due depositors. The amounts due depositors by the banks is not a debt. It has so been held by the courts. The banks were the actual owners of all the moneys and credits in their possession. They became the owner of all the money deposited with them. Of course, they must pay it back, under certain circumstances, but, as long as they held it, they were the owner, and the courts have so held. If, therefore they were required to pay upon all the property owned by them and allowed to deduct their actual debts, such as bills payable and accounts payable, but could not deduct the amount of their deposits, which are not debts in that sense, then the amount of the tax they would have been required to pay on the five mill levy would have been much in excess of the tax they did

pay under the present assessment. So they have nothing to complain of, on that ground, and would not be any better off if the five mill levy had been applied to them. The individual who had a hundred thousand dollars loaned out on mortgages, and who had no debts to deduct and who was assessed five mills on the dollar, on the whole hundred thousand, would pay $500.00, a much higher tax than a bank which had a hundred thousand dollars invested in mortgages, $15,000.00 of which was its capital and $85,000.00 of which was deposits or depositors' money, if the bank was assessed on the same basis on which the banks were assessed in this case, namely, with deposits deducted and the consolidated levy of 134 mills applied to 20% of the remaining capital as it would only pay $402.00. As a matter of fact, therefore, there was no discrimination against the banks in assessing people who had no debts to offset against their mortgages on the basis of five mills on the dollar, even if they were in competition with the banks.

The petitioner has not been hurt by the imposition of the tax complained of. This is true for at least two reasons. In the first place, petitioner is not assessed upon the capital that is actually employed by it in its business as it should be if it were assessed as moneys and credits, but is assessed only upon the capital, surplus and undivided profits less the real estate. The record shows, and it is without dispute, that the great part of petitioner's capital is composed of the deposits. If it were not for the deposits, petitioner could not and would not operate in the manner it does and could not make the profit that has been realized by it upon its stock. Yet petitioner pays no tax upon this capital which exceeds by many million the amount of the bank's capital, surplus and undivided profit upon which it is taxed. If the deposits were added to the bank's capital as it is now assessed, and it were all taxed as moneys and credits, the amount which

petitioner would be required to pay would far exceed the payments under the rate it is now assessed.

Then too, it is pertinent to inquire how much have the taxes of the petitioner been increased because of the alleged discrimination. There is no showing that they have been increased or that any unjust burden has been imposed upon them. The other taxpayers in the taxing district must of necessity share in any additional burden because of the alleged discrimination. The taxes paid by the other taxpayers far exceed that paid by petitioner.

In fact, taxes paid by petitioner are but a fractional part of all the taxes paid in the taxing district as was shown by the evidence. We believe it is impossible for petitioner to show in dollars and cents that it has been hurt at all by the alleged discrimination. In any event the record is barren of such evidence. If it is granted relief the other innocent taxpayers who have paid their full share of taxes will have to pay these recovered taxes to the bank. What equity is there in this, the other taxpayers have done no wrong.

In the absence of a showing for either of the reasons urged, that plaintiffs have been hurt, under the well established and recognized rules of law, they cannot question the unconstitutionality of the proceedings.

PROPOSITION XV.

The Actions Are Barred by the Statute of Limitations.

The question under the Statute of Limitations, aside from the question that arises in some of the cases as to the taxes for the year 1919, is, whether or not, Sub-division 4 of Section 11007 of the Code, containing the three year limitation in actions against a sheriff or other public officer, applies to these cases. It would seem to us that there is reasonable ground for holding that the three year statute does apply,

for the ground of recovery in this case is based on the omission of an official duty upon the part of the Auditor and Treasurer in not properly assessing the alleged competing companies. Or, if not an act of omission, then the act of the Auditor in changing the assessments so as to assess the alleged competing capital as moneys and credits. In view, however, of all the other questions under which we believe the case should be decided in favor of the defendants, we will not make any extended argument on the question, but merely suggest it for the consideration of the court.

Section 11007 of the Code of Iowa, Subdivision 4, reads as follows:

> "11007. Period of. Actions may be brought within the times herein limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially declared: * * * 4. Against sheriff or other public officer. Those against a sheriff or other public officer growing out of a liability incurred by the doing of an act in an official capacity or by the omission of an official duty, including the nonpayment of money collected on execution, within three years."

See also the following case decided by the Supreme Court of Iowa:

Murphy v. Supervisors, 215 N. W., 744.

PROPOSITION XVI.

No Evidence of Competition—Relating to Assessment for 1919.

The years and assessments and taxes paid in question in this case are:

Assessments for the years 1919, 1920, 1921 and 1922.
(R. 0003—Par. 5 of Petition.)

Taxes paid for the years 1919, 1920, 1921 and 1922.
(R. 0015—Par. 27-28 of Petition.)

Shares of corporation stock shall be assessed at the value on the first day of January of each year. (Iowa Code, 1897—Section 1323.) While this section refers to Iowa corporations, it is provided by Iowa Code 1913 Supplement, Section 1366, the assessment roll is to be completed and laid before the board of review "on or before the first Monday of April in each year".

The assessor begins his work and the assessors meet before January 13th of each Year (Iowa Code 1897—Section 1359).

It follows then the classification of the business is unavoidably based on transactions prior to the assessment. As a result in 1919, it was the business as it was conducted in 1918 that determines the classification of the business for 1919 assessment. It is not, as relates to the 1919 assessment, material what any company did as business in 1919. It is the business done in 1918 that determines its character as to the classification of the assessment for 1919.

There is absolutely no testimony of any kind or character by inference or otherwise to show the business of the plaintiff bank or any of its alleged competitors in the year 1918.

We could not object to the testimony of business done in 1919, 1920 or 1921 for this reason, as testimony for those years was relevant because of its effect upon the assessments for the years 1920, 1921 and 1922 respectively, but we did object to the admission of the assessment rolls for the 1919 assessment because there was no evidence as to character and amount of business done in 1918. We did, upon the trial continuously and consistently, object to testimony as to business methods in the year 1922.

The record, page 0351, shows this objection:

"The following evidence was received subject to the specific objection by counsel for defendants that the business carried on by the bank in 1922 is immaterial and beyond the issues of the case."

We respectfully submit, it is plain that there is no evidence of any competition for the period existing just prior to and at the time of the assessment and therefore there is nothing on which anything can be based as a claim of recovery of the taxes, penalties and interest for the taxes for the year, 1919.

PROPOSITIONS XVII AND XVIII.

Not a Final Judgment.

The petitioners herein have not obtained a final judgment in the court of last resort of Iowa and are not therefore entitled to a writ of certiorari in this honorable Court. The record herein discloses that the petitioner, within the time prescribed by the statutes of Iowa, filed its notice of intention to file a petition for rehearing with the Supreme Court of Iowa. The respondents have also filed notice of intention to file petition for rehearing in the Supreme Court of Iowa. The record as shown by the certificate of the clerk of the Supreme Court of Iowa on pages 1409-1414 of the printed record shows that the matter is undisposed of and still pending so far as the record shows. Under the statutes of Iowa it is discretionary with the Supreme Court of Iowa whether they will grant a rehearing or not. If a rehearing is granted and the Supreme Court of Iowa so determines, it may decide the case anew and reach an entirely different result from the decision on which petitions for rehearing were to be filed. The petitioners herein may, in the event of a rehearing in the Supreme Court of Iowa, thus obtain a decision favorable to their contention and granting them the relief

demanded. Until the Supreme Court of Iowa has exercised its discretion as to whether or not a rehearing will be granted, a decision therein is not final in the event a petition for rehearing has been filed. This honorable Court has passed upon the question here presented on several occasions. In *Andrews v. Virginian Ry Co.*, 248 U. S. 272, at 275 it is said:

> "It is true that under the law of Virginia in a case like this the power of a court of appeals to review the judgment of the trial court was gracious or discretionary, and not imperative or obligatory; but the existence of the power, and not the considerations moving to its exercise, is the criterion by which to determine whether the judgment of the trial court was final at the time of its apparent date, or because so only from the date of the happening of the condition—the action of the court of appeals—which gave to that judgment its only possible character of finality for the purpose of review in this court. Nor is the result thus stated a technical one, since it rests upon the broadest considerations inhering in the very nature of our constitutional system of government, and material, therefore, to the exercise by this court of its rightful authority. * * *"

In *Citizens Bank v. Opperman*, 249 U. S. 448, 450 this honorable Court said:

> "Where a petition for rehearing is entertained the judgment does not become final for purposes of our review until such petition has been denied or otherwise disposed of and the three months' limitation begins to run from date of such denial or other disposition."

So in the case at bar notice of intention to petition for rehearing having been filed, the petitioner herein is not entitled to certiorari until the petitions for rehearing have been filed and finally disposed of.

The petitioner by filing its notice of intention to file a petition for rehearing has again invoked the action of the Supreme Court of Iowa, and if its petition is filed there is no

final judgment until the same is acted on by the Iowa court. If the petitioner does not file its petition for rehearing in compliance with its notice, then, in effect, after invoking the further action of the Iowa court and setting the machinery in motion by its notice, it has abandoned or dismissed the same, which is equivalent to accepting and acquiescing in the judgment of the Iowa court. It would be in the same position as if, after appealing originally to the Supreme Court of Iowa it had voluntarily dismissed its appeal, thus by its own action preventing a final decision by the highest court of the state, such as is required to entitle it to come to this court by certiorari.

There is also no final decision until the procedendo has been sent down by the Supreme Court of Iowa to the District Court. The record not only fails to show that the procedendo has been sent down, but on the other hand it shows positively that it has not been sent down. At the request of petitioner an order was entered by the Supreme Court that the procedendo should *not* issue for the present. See Page 1399 of printed record. By this very action petitioner has recognized that if the procedendo had been sent down it would have had a final judgment against it as to which it could do nothing further in the State Courts. By requesting the Supreme Court not to send down the procedendo it in effect requested that court to retain jurisdiction so that it could make further orders in the case if desired, and it also thereby prevented the judgment from being final in such sense as to give it the right to appeal to the Supreme Court of the United States, under the rulings of that court.

In conclusion we wish to expressly call the court's attention to the case of

Nelson v. First National Bank of Sioux City, 42 Fed. (2nd) 30,

decided by the Circuit Court of Appeals of the 8th Circuit on June 26, 1930. We have already cited this case as supporting our proposition that the petitioner in this case had not exhausted all of the administrative remedies furnished by the Iowa law.

We desire to dwell at a little further length on this case for the reason that not only is it an authority on that proposition but also is authority on some other points in this case.

We particularly wish to draw attention to it because of the statement made in that case as to the case of

Munn v. Des Moines National Bank, 18 Fed. (2nd) 269,

which is relied upon so strongly by counsel for petitioner in the present case and which case was also decided by the Circuit Court of Appeals of the 8th Circuit. The Circuit Court of Appeals in the *Nelson* case says that the *Munn* case cannot be considered as an adjudication or finding that a right to appeal from the Assessor to the Board of Review was an inadequate remedy, that the decision in the *Munn* case was based upon the peculiar facts in that case. Facts, as we have heretofore set out, which are radically different from the case at bar. In the case at bar the petitioner knew of this alleged discrimination against it and knew it was occurring each year as far back as the year 1919, and made no effort whatever to have it remedied by the Board of Review. If its officers knew in 1919 they were being discriminated against they then had a whole year in which to have found out if they did not already know, as they said they did, in whose favor this discrimination was being exercised. And it would have been a matter of very little work to

have discovered or checked up between January 1, 1920 and May 1, 1920, when the Board of Review met, to see whether or not these same discriminations had been made during that year, and so on during the succeeding years. The record in this case shows that practically the same persons and corporations appeared in the evidence offered by the petitioner, in each of the years as to which complaint was made, as being favored or as to whom discrimination was made against the petitioner. Of course, a few of them did drop out each year and a few would come in, but generally the discriminations were in favor of the same persons and corporations during each of the years as to which complaint is made. So that the petitioner in this case had ample information and opportunity to have presented the matter to the Board of Review and have asked that on account of such discrimination its assessment should be as moneys and credits.

The *Nelson* case was one where relief was sought by injunction and the Court held that as to the years in which they might have appealed to the Board of Review but did not the petitioners could have no relief. One of the banks, however, for one year did take such appeal to the Board of Review and the Circuit Court of Appeals held that that bank as to that one year was not prevented from taking the matter up with the Federal or State Court. That whether it sought relief from the state court or the federal court it was no longer administrative process but judicial. In the case at bar the petitioner in most of the years did not, while it took an appeal to the Board of Review, raise the question now raised in this suit as to discriminations. It possibly, in one year, did raise the question of discrimination against it. In the other years it did not. However, instead of them taking the case for injunctive relief to either the Iowa Courts or Federal Courts it further followed the provision of the

Iowa statute and appealed to the Iowa Court and the appeals to the Iowa Court, whether it raised this question or whether it did not, were all decided against it, and it carried the matter no further. So that in the cases where it did not appeal to the Board of Review it cannot now have relief under the rules laid down in the *Nelson* case and in the year that it did raise the question of discrimination it sought its relief in the State Court and such relief was there denied and the suit dismissed so that there is an adjudication against it for that year. Therefore, under the rules as announced in the *Nelson* case there can be no recovery here on the part of the petitioner.

There is, however, another point decided by the *Nelson* case which would deprive the petitioner of relief also, and that is that the remedy sought here for repayment of taxes erroneously paid or illegally exacted under Section 7235 of the Code of Iowa, 1924, is not available to the petitioner in such a case as this. That that statute only applies where the officer or officers had no authority to levy a tax or it was in some other respects illegal and does not include such a case as this where the property was erroneously taxed. In the case at bar it was an irregular and not an illegal tax and, therefore, the petitioner could not pursue the remedy he is pursuing in the case at bar.

We submit, therefore, that our claim that the petiitoner is not entitled to recover in this case and that the finding of the Supreme Court of Iowa should be approved and affirmed is amply established by the facts and the authorities cited, and on more than one ground. We do not wish, however, to convey the impression that by only mentioning in this conclusion some of the grounds that prevent petitioner's recovery that we wish to minimize or abandon the others and we are insisting upon all of the grounds alleged, including the matters of practice, that the petitioner has not

pursued his remedy in the state court to a conclusion and that no final judgment has yet been entered from which he could come by certiorari to the Supreme Court of the United States. Certiorari of itself is predicated upon and presupposes that all administrative remedies have been exhausted and the indisputable facts show they have failed to follow and exhaust all their administrative remedies.

Respectfully submitted,

ESKIL C. CARLSON,
MAXWELL A. O'BRIEN,
Attorneys for Respondents.

GEORGE A. WILSON,
CHAS. HUTCHINSON,
on the Brief.

APPENDIX.

13 Corpus Juris 444; Section 381.

"Interference with Duties of Quasi Public Corporations. The general rule has been laid down that any contract of a corporation by which it disables itself from performing its duties to the public, or subordinates to its private interests the rights and conveniences which it impliedly undertakes to secure to the community, is invalid as contrary to public policy. So agreements by railroad companies and other common carriers, water and gas companies, and other quasi public corporations owing duties to the public, which interfere with the performance of such duties, are illegal and void as being contrary to public policy, the question not depending on whether the public has in the particular case suffered any detriment, but on whether the contract is in its nature such as might be injurious to the public. This principle has been applied, for example, to an agreement or combination by or between railroad companies leasing or conveying property necessary to enable them to perform their duties to the public, or discontinuing a line, etc.; to an agreement between two connecting railroad companies that one should discontinue the use of a part of its road by which it has long been connected with a line of steamboats at tidewater, which was one of its termini under its charter, and that the other should use its influence to prevent the extension of a third road which would interfere with the business of the first one; and to agreements by which a railroad company binds itself not to build its railroad along a particular route, to locate, or not to locate its station or depot at a particular point, or to locate it at a particular point; or to furnish or not to furnish sidings, unless, according to some of the cases, where the agreement is to locate along a particular route or at a particular point, it is not restricted from locating lines, stations, or depots along other lines, or at other points also, or otherwise doing whatever the public convenience may require. Contracts by common carriers and other quasi public corporations making undue discrimination in favor of particular persons are generally prohibited by statute, but they are also illegal as contrary to public policy."

38 Corpus Juris 770; Section 412.

"Necessity of existence of funds. Mandamus will not issue to compel the payment of a claim against a municipality where no appropriation has been made for such payment, or where there are no funds on hand applicable to the payment of the claim; and funds appropriated for one purpose will not be compelled to be devoted to another, although, where designated claims are required by statute to be paid out of a "general fund" the fact that a special fund has been set apart for payment of such claim and had been exhausted will not prevent the issuance of mandamus to compel payment of such claims out of the general funds. Where the funds are not on hand, mandamus to pay when the funds shall be received cannot issue. The rule that mandamus will not issue to compel an officer to perform has been applied to prevent the issuance of a mandamus to compel the payment of a claim from a fund properly applicable to the indebtedness where such fund has been wrongfully dissipated or diverted; but there are decisions that hold that mandamus will issue notwithstanding the fund from which payment should have been made had been wrongfully appropriated or diverted to other purposes, provided it is clearly made to appear that the officer against whom the writ is sought actually received moneys from which the claim would be payable."

1913 Code, Section 1366. (Supplement).

"Assessors" books returned. That section thirteen hundred sixty-six of the code be and the same is hereby repealed and the following enacted in lieu thereof:

" 'Such rolls shall be laid before the local board of review on or before the first Monday of April in each year for correction, and when such correction has been completed, the assessor shall proceed to make up the assessor's books in duplicate from such assessment rolls, allotting a sufficient number of pages to each letter, and return to the county auditor, together with the assessment rolls, plat book, and all statements which have been furnished to him in connection with the assessment, and the county auditor shall foot up each column of numbers and values on each page and enter such footings in recapitulation sheets, and not later than the

tenth day of May return one of the books to the township clerk, and to the city or town clerk.'"

1897 Code, Section 1359.

"Meeting of assessors. The county auditor of each county shall, before the third day of January annually, issue a call to all the assessors of his county to meet at his office, or some other place at the county seat, within ten days for consultation, and to receive from such auditor such information as shall tend to the proper discharge by them of their official duties. It shall be the duty of each of such assessors to attend such meeting, and they shall be allowed pay of one day for such attendance, and mileage at six cents per mile one way."

1897 Code, Section 1323.

"Shares of corporation stock. The shares of stock of any corporation organized under the laws of this state, except those which are not organized for pecuniary profit, and except corporations otherwise provided for in this act, shall be assessed to the owners thereof, at the place where its principal business is transacted, the assessment to be on the value of such shares on the first day of January in each year; but in arriving at the total value of the shares of stock of such corporations, the amount of their capital actually invested in real estate owned by them, either in this state or elsewhere, shall be deducted from the real value of such shares, and such real estate shall be assessed as other real estate, and the property of such corporation, except real estate situated within the state, shall not be otherwise assessed. Every such corporation annually, on or before the twenty-fifth day of January, shall furnish to the assessor of the assessment district in which its principal place of business is located a verified statement, showing specifically, with reference to the year next preceding the first day of January then last past:

"1. Total authorized capital stock and number of shares thereof;
"2. Number of shares of stock issued and par value of each;
"3. Amount paid into the treasury on each share and the total capital paid in;

"4. Description and value of each tract of real estate owned by said corporation;
"5. Date, rate per cent and amount of each dividend declared, and the amount of capital on which each such dividend was declared;
"6. Gross and net earnings, respectively, during the year, and the amount of surplus;
"7. Amount of profit added to sinking fund;
"8. Highest price of sales of stock between the first and tenth days of January of the current year;
"9. Highest price of sales of stock during the preceding year and average price of such sales."

1897 Code, Section 1417.

"Refunding erroneous tax. The board of supervisors shall direct the treasurer to refund to the taxpayer any tax or portion thereof found to have been erroneously or illegally exacted or paid, with all interest and costs actually paid thereon. In case any real estate subject to taxation shall be sold for the payment of such erroneous tax, interest or costs, the error or irregularity in the tax may be corrected at any time provided in this chapter, but such correction shall not affect the validity of the sale or the right or title conveyed by a treasurer's deed, if the property was subject to taxation for any of the purposes of which any portion of the taxes for which the land was sold was levied, and the taxes were not paid before the sale, or the property redeemed from sale."

1927 Code, Section 7235.

"Refunding erroneous tax. The board of supervisors shall direct the treasurer to refund to the taxpayer any tax or portion thereof found to have been erroneously or illegally exacted or paid, with all interest and costs actually paid thereon."

1924 Code, Section 12440.

"Definition. The action of mandamus is one brought to obtain an order commanding an inferior tribunal, board, corporation, or person to do or not to do an act, the perform-

ance or omission of which the law enjoins as a duty resulting from an office, trust or station."

1924 Code, Section 12441.

"Discretion—exercise of. Where discretion is left to the inferior tribunal or person, the mandamus can only compel it to act, but can not control such discretion."

1927 Code, Section 12452.

"Form of order—return. The order shall simply command the performance of the duty, shall be directed to the party, and may be issued in term or vacation, returnable forthwith, and no return except that of compliance shall be allowed; but time to return it may, upon sufficient grounds be allowed by the court or judge, either with or without terms."

1927 Code, Section 12456.

"When writ may issue. The writ of certiorari may be granted when authorized by law, and in all cases where an inferior tribunal, board, or officer exercising judicial functions is alleged to have exceeded his proper jurisdiction, or is otherwise acting illegally, and there is no other plain, speedy and adequate remedy."

1924 Code, Section 7149.

"Corrections by auditor. The auditor may correct any error in the assessment or tax list, and may assess and list for taxation any omitted property."

1924 Code, Section 6992.

"Stock and 'moneyed' capital denied deduction. No deduction for debts shall be allowed from the shares of stock of any state, savings or national bank or loan and trust company, nor from moneyed capital used in competition with banks, within the meaning of section 5219 of the revised statutes of the United States."

1924 Code, Section 11007.

"Period of. Actions may be brought within the times herein limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially declared:

"1. In actions for injuries from defects in roads or streets—notice. Those founded on injury to the person on account of defective roads, bridges, streets, or sidewalks, within three months, unless written notice specifying the time, place and circumstances of the injury shall have been served upon the county or municipal corporation to be charged within sixty days from the happening of the injury.

"2. Penaltes or forfeitures under ordinances. Those to enforce the payment of a penalty or forfeiture under an ordinance, within one year.

"3. Injuries to person or reputation—relative rights—statute penalty—setting aside will. Those founded on injuries to the person or reputation, including injuries to relative rights, whether based on contract or tort, or for a statute penalty, within two years; and those brought to set aside a will, within two years from the time the same is filed in the clerk's office for probate and notice thereof is given; provided that after a will is probated the executor may cause personal service of an original notice to be made on any person interested, which shall contain the name of the decedent, the date of his death, the court in which and the date on which the will was probated, together with a copy of the will; said notice shall be served in the same manner as original notices and no action shall be instituted by any person so served after one year from date of service.

"4. Against sheriff or other public officer. Those against a sheriff or other public officer, growing out of a liability incurred by the doing of an act in an official capacity or by the omission of an official duty, including the payment of money collected on execution, within three years.

"5. Unwritten contracts—injuries to property—fraud—other actions. Those founded on an unwritten contract, those brought for injuries to property, or for relief on the ground of fraud in cases heretofore solely cognizable in a court of chancery, and all other actions not otherwise provided for in this respect, within five years.

"6. Written contracts—judgments of courts not of record—recovery of real property. Those founded on written contract, or on a judgment of any courts except those provided for in the next subdivision, and those brought for the recovery of real property, within ten years.

"7. Judgments of courts of record. Those founded on a judgment of a court of record, whether of this or of any other of the United States, or of the federal courts of the United States, within twenty years.

"8. Judgment quieting title. No action shall be brought to set aside a judgment or decree quieting title to real estate unless the same shall be commenced within ten years from and after the rendition thereof."

1927 Code, Section 12880.

"Petition for rehearing. If a petition for rehearing is filed, it shall suspend the decision, if the court or one of the judges upon its presentation so order, until after the final decision on the rehearing."

1927 Code, Section 12881. Subd. 4.

"Rehearing—notice. Written notice of intention to petition for a rehearing shall be served on the opposite party or his attorney and the clerk of the supreme court within thirty days after the filing of the opinion, or within such time as the court may by rule prescribe."

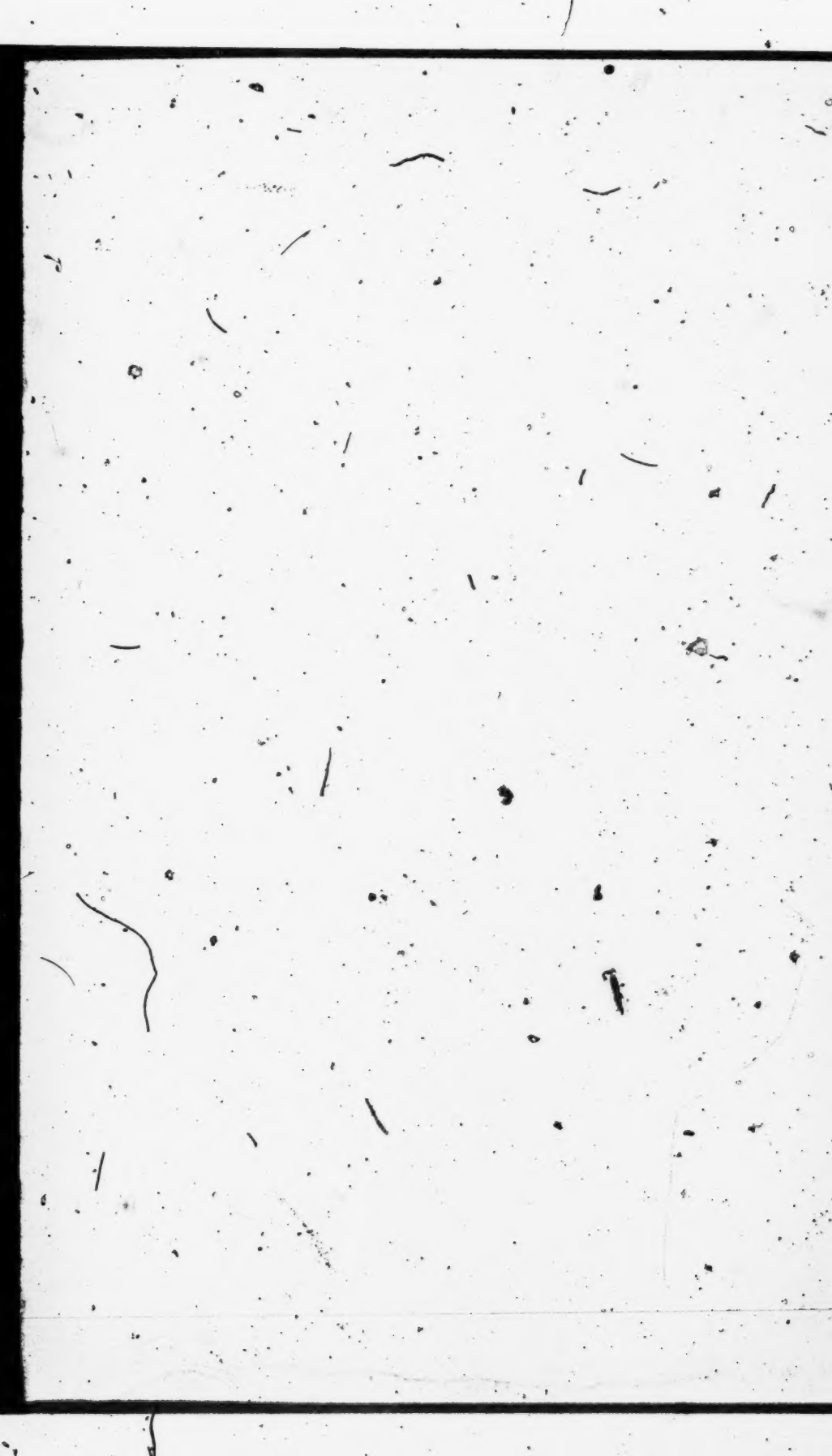
1927 Code, Section 12883.

"Petition may constitute brief and argument. The petition may be made the argument or a brief of authorities relied upon for rehearing. The adverse party may file a printed argument in response. If the party applying for a rehearing shall give notice of oral argument in his petition, then both parties shall be entitled to be heard orally, unless the party giving notice waives argument."

Rule 27, Supreme Court of Iowa.

If the case is triable upon errors assigned and not *de novo* and appellant has given notice of oral argument, he will be

entitled to open and close. If appellee alone gave the notice he will be entitled to open the argument and appellant must confine his remarks strictly to a reply. If the cause is triable *de novo* the party upon whom rests the burden of the proof may, if he has given the requisite notice, open and close the argument. If he has not given notice he will be confined strictly to an answer to the argument for the other side. No oral argument shall exceed one-half hour in length, unless an extension of time be granted before the argument is commenced or it becomes apparent during the course of the argument that more time is necessary, whereupon the court may grant additional time. On original submission two attorneys may be heard on each side; but in the event counsel opening the argument is not entitled to reply, but one attorney shall be heard for either party. Reply arguments shall be limited to fifteen minutes. On petitions for rehearing only one attorney shall be heard for either party, the petitioner to have not exceeding twenty and the respondent not more than fifteen minutes, unless extensions be granted by the court.



FILE COPY

FILE
FEB 5 1
CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 161

CENTRAL STATE BANK, PETITIONER,

v.

J. M. STEWART ET AL., RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA AND BRIEF IN SUPPORT THEREOF.

J. G. GAMBLE,
A. B. HOWLAND,
Counsel for Petitioner.

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
Summary statement of the matter involved	1
Reasons relied upon for the allowance of the writ	21
Specification of errors	23
Prayer for writ	26
Brief in support of petition for writ of certiorari	29
I. The opinion of the court below	29
II. Jurisdiction	29
III. Statement of the case	30
IV. Specification of errors	31
V. Argument	31
Summary of argument	31

The decision below is of rights arising under the Fourteenth Amendment to the Constitution of the United States and Section 5219 of the Revised Statutes of the United States, and is contrary to and in conflict with prior decisions of this court, and of final decisions of other Federal courts.

The decision below denied a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion, and is in itself a contravention of the Fourteenth Amendment.

The decision below is of substantial Federal questions and is based upon untenable conclusions of general law, and is in conflict with the weight of authority.

Table of Cases Cited.

Avoca State Bank v. Burke, County Auditor, 193 Iowa, 1055	36, 45
Carpenter v. Shaw, 280 U. S., 363	22, 30, 47, 52
Chicago & Northwestern Ry. Co. v. Osborne, 266 U. S., 14	37
Commercial National Bank v. Board of Supervisors, 168 Iowa, 501	48
Cummings v. Merchants National Bank of Toledo, 101 U. S., 153	22, 30, 37
Des Moines National Bank v. Fairweather, 191 Iowa, 1244	55

Page

First National Bank of Remsen v. Hayes, County Auditor, 186 Iowa, 892 ..... 35, 45
First National Bank of Hartford v. City of Hartford, 273 U. S., 548 ..... 21, 30, 38
First National Bank v. City of Council Bluffs, 182 Iowa, 107 .. 50
First National Bank of Estheryille v. City Council, 150 Iowa, 95 56
Green v. L. & I. Ry. Co., 244 U. S., 499 ..... 30, 51
Home Savings Bank v. Des Moines, 205 U. S., 503 56
Merchants National Bank of Richmond v. Richmond, 256 U. S., 635 38
Minnesota v. First National Bank of St. Paul, 273 U. S., 561 ..... 21, 30, 38
Montana National Bank v. Yellowstone County, 276 U. S., 497 ..... 22, 30
Munn, County Treasurer, v. Des Moines National Bank, 18 Fed. (2d), 269 ..... 22, 25, 34, 38, 47, 50, 55
Murphy v. Berry, 200 Iowa, 974 48
Northwestern Bank of Ireton v. Van Roekel, 202 Iowa, 237 44
Raymond v. Chicago Union Traction Company, 207 U. S., 20 40
Reagan v. Farmers Loan & Trust Co., 154 U. S., 362 ..... 22, 30, 37
Security Savings Bank v. Board of Review, 189 Iowa, 463 36
Sioux City Bridge Company v. Dakota County, 260 U. S., 441 ..... 37, 51
Sunday Lake Iron Company v. Wakefield, 247 U. S., 350 37
Taylor v. L. & N. Ry. Co., 88 Fed., 350 ..... 40, 51
Ward v. Love County, 253 U. S., 17 ..... 22, 30, 47, 52

TABLE OF STATUTES CITED.

Judicial Code, Section 237 29
Revised Statutes of the United States, Section 5219 ..... 23, 24, 32, 38
Code of Iowa, 1897, Section 1387 ..... 42, 62
1390 ..... 42, 62
1396-7 ..... 43, 62, 63
1417 ..... 2, 48, 63
Code of Iowa, Supplement, 1913, Section 1072 41
1310 ..... 2, 3, 32, 36, 58
1322 ..... 2, 32, 59
1322-la 2, 7, 32, 60
1383 ..... 42, 61
1385-b 35, 42, 61
Laws 37th Iowa General Assembly, Chapter 343 ..... 42, 64

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No.

CENTRAL STATE BANK, PETITIONER,

v.

J. M. STEWART, CHAIRMAN OF THE BOARD OF SUPERVISORS OF POLK COUNTY, ET AL., RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Supreme Court of the United States:

The petitioner, Central State Bank, respectfully states and shows to this Honorable Court:

Summary Statement of the Matter Involved.

The petitioner, a state bank organized and existing under the laws of the State of Iowa, relating to banking institutions, was at all times herein referred to, engaged in the business of banking in the City of Des

1e

Moines, Polk County, Iowa. It brought this action in mandamus in the District Court of Polk County, Iowa, seeking a writ directing the respondents, in their respective capacities as members of the Board of Supervisors and County Auditor and County Treasurer of said county (proper substitution of successors in office during the pendency of the action, having been made), to refund to the petitioner certain taxes and penalties thereon erroneously and illegally exacted of the petitioner by said respondents and by the taxing officers of the county in the years 1919 to 1922, inclusive. The proceeding is one authorized by the Statutes of Iowa in force at the time the cause of action accrued (Code 1897, Section 1417) now included in the Code of 1927 as Section 7235.

During the four years involved the statutes of Iowa provided that the shares of national banks, state banks, loan and trust companies and "all moneyed capital within the meaning of section fifty two hundred nineteen of the revised statutes of the United States" should be taxed at the combined millage rate for State, County, City and school purposes, applied to twenty per cent of the actual assessed value thereof. See Sec. 1310-1322 and 1322-1*a* Code Supplement 1913, Appendix. The combined millage rate was commonly referred to as the "consolidated levy." The Iowa statutes also required that moneys and credits, annuities, cash, U. S. legal tender currency, notes, including those secured by mortgages, bonds, debentures, accounts, contracts, bills of exchange, judgments, liens and choses in action be taxed at the uniform rate of five

mills on the dollar applied to the actual assessed value. See Sec. 1310 Code Supp. 1913. Appendix.

The basis of the action was:

First. That during the four years in question the taxing officials of the City of Des Moines and County of Polk subjected the shares of the petitioner to taxation at the consolidated levy rate applied to twenty per cent of the assessed value; but at the same time deliberately, systematically and intentionally subjected all competing moneyed capital, as defined by Sec. 5219, to taxation at but five mills on the dollar, and thereby subjected the shares of stock of petitioner to taxation in said years at rates from five to seven times the rate imposed upon "such other moneyed capital." That the deliberate, intentional, systematic and habitual discrimination thus practised against the shares of petitioner constituted a violation of the restrictions contained in Section One of the Fourteenth Amendment to the Constitution of the United States, and the action of the state, through its duly constituted taxing officers constituted not only a violation of the laws and constitution of Iowa but as well a violation of the equal protection clause of the Fourteenth Amendment to the Federal Constitution.

Second. That the action of the taxing officers of Polk County and of the City of Des Moines was systematic, habitual, and was deliberately followed during all of said years as part of a plan for the administration of the taxing laws of Iowa and as such constituted a clear, deliberate and intentional discrimination be-

tween taxpayers placed within the same class. That by the action of the taxing officers charged with the administration of the tax laws in said City and County the petitioner was denied the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States.

That the county treasurer of Polk County, Iowa, the collecting agent of taxes for the State of Iowa and all of its political subdivisions, demanded of the petitioner that it pay taxes upon its shares at the said consolidated levy rate, together with interest and penalties thereon, and threatened to enforce collection of said taxes, interest, and penalties by seizure and sale of plaintiff's property; that in order to prevent the sale of its property and the accumulation of penalties, the petitioner, on November 30, 1923, under protest, paid to the said treasurer the following amounts, to-wit:

Year.	For taxes.	For penalties.
1919	$8,745.48	$3,945.37
1920	10,286.68	3,908.34
1921	12,292.62	3,196.08
1922	14,343.65	1,147.49

Third. That in the year 1923, suits were instituted in the United States District Court for the Southern District of Iowa, against the County Treasurer of Polk County, Iowa, by the Des Moines National Bank, The Bankers Trust Company and the Iowa Loan & Trust Company, which resulted in judgments permanently enjoining the County Treasurer and his successors in office, from collecting taxes against the shares of the three banks named, at a greater rate than five (5) mills on the dollar of actual valuation for the

years 1919 to 1922, inclusive, on account of the unlawful and unconstitutional administration of the statutes of the State of Iowa, by the taxing officers of the City of Des Moines and of Polk County. The Des Moines National Bank was organized under the national banking laws and the Bankers Trust Company and Iowa Loan & Trust Company were organized under the Iowa law, relating to state banks and trust companies. That the said county treasurer appealed from said judgment and decree, and the board of supervisors and the State of Iowa, by the Attorney General, and the City of Des Moines, by its corporation counsel, all appeared in said cause upon its trial in the District Court, and in the appeal therefrom to the Circuit Court of Appeals of the United States for the Eighth Circuit, and participated in the presentation of the defense to said action, and bore a part of the expense of the defense of said action. That the judgment and decree of said District Court of the United States was affirmed by said Circuit Court of Appeals of the United States and no review thereof was sought in this Court, so that said judgment became final. That under and pursuant to said judgment, and because of the unconstitutional and unlawful acts of the taxing officials of the same taxing district for the same years involved in this cause as determined in said action, the shares of stock of said Des Moines National Bank, Bankers Trust Company and Iowa Loan & Trust Company, were subjected to taxation at only five mills on the dollar.

Respondents, by way of answer in said action, admitted that levies were made upon the shares of petitioner substantially as alleged in the petition, but pleaded other defenses which may be summarized as follows:

1. A denial of facts not admitted.

2. That the money paid by the petitioner in each of the years in controversy had been distributed to the various political subdivisions entitled thereto, and respondents had no money with which to make refund to petitioner if the court were to so decree.

3. The statute of limitations.

4. Laches.

5. That the petitioner had a plain, speedy, and adequate remedy at law.

6. That the remedy of the petitioner, if any, is by appeal from the action of the board of review.

7. The petitioner is not entitled to maintain an action in mandamus.

8. That petitioner may not recover because of a violation of the taxing statutes of Iowa by the taxing officers.

9. That the petitioner does not come into court with clean hands, in that during the years in controversy the plaintiff, through its officers and agents, assisted and aided other taxpayers in evading and dodging taxation in Polk County, Iowa, and elsewhere.

10. That petitioner may not maintain an action to procure refunds of the taxes upon its shares of stock, even though paid by it, because it is not the proper party to maintain such action.

11. That the District Court was without jurisdiction to grant the relief prayed, for it affirmatively appeared, that, after the institution of the action, the board of supervisors had denied the claim, and that such action by the board of supervisors constituted a judicial determination and finding, which cannot be collaterally attacked in a mandamus action, and that petitioner's remedy, if any, was by certiorari and not by mandamus.

12. That there was no adjudication in the action in the United States Courts, except an adjudication that the county treasurer should be enjoined from collecting certain taxes upon the shares of the Des Moines National Bank, and that the same was in no way binding upon the respondents.

Upon the trial of said action the following material facts were adduced:

In January of each of the years involved, petitioner made to the city assessor of Des Moines, Iowa, a statement as required by Section 1322, Code of Iowa 1897, and 1322-1-*a*, Code Supplement 1913 (R. 230-231, 1061), which disclosed the total amount of capital, surplus and undivided earnings, and the book value of the real estate of petitioner as of January 1st of each year. The said city assessor made one assessment in a lump sum upon all the shares of petitioner, and entered the

same under the head "corporation stock" upon form No. 1 of the assessment rolls (R. 229, 230, 1064, 1065). The assessment rolls were, as required by statute, laid before the City Council of the City of Des Moines sitting as a board of review in each year by said assessor, and said board of review adjourned *sine die* on April 30, 1919, for that year, on May 1, 1920, for that year, on April 20, 1921, for that year, and on May 6, 1922, for that year (R. 619, 620).

Corporations engaged in the loan business made statements to the city assessor for taxation purposes in each of the said years upon forms furnished by the assessor (R. 1056, 1057), and the assessor made assessments upon the shares of such corporations upon form No. 1 of the assessment roll and entered the same under the head "corporation stock" (R. 1053). When such assessments had been completed, and after the board of review had met and adjourned in each of said years, the assessor copied the assessments into books referred to as assessor's district books (R. 1070, 274). The assessor's books were then certified and transmitted to the county auditor, and such assessments on the assessor's district books (other than the assessments of banks and trust companies) as "corporation stock" were placed on the tax list in each of said years as "moneys and credits" and taxed at the rate of five mills on the dollar (R. 277-281). All assessments upon the shares of mortgage loan companies, investment companies, and companies engaged in the purchase and sale of commercial paper, were uniformly

and intentionally taxed at such rate of five mills on the dollar in all of the said four years (R. 280).

The city assessor made assessments against individuals holding notes, bonds, mortgages, and other evidences of indebtedness on form No. 2 of the assessment roll (R. 660, 1059), from which the debts of the taxpayer were deducted from his credits, and the net amount was certified upon the assessor's district books to the county auditor. In the four years in question all such net assessments against individuals owning notes, mortgages, bonds, or other evidences of indebtedness, were taxed at five mills on the dollar (R. 278).

There was no moneyed capital in the hands of individual citizens taxed at a higher rate than five mills on the dollar (R. 278, 285).

The consolidated levy in each of said years consisted of the total millage requirements for state, county, city and school purposes (R. 172), and for the year 1919 was 137.8 mills; 1920, 157 mills; 1921, 164 mills; 1922, 160.4 mills (R. 172), which millage was applied to 20 per cent of the total value of the shares of stock of petitioner as assessed by the assessor (R. 85). The tax lists were made up by the county auditor after the assessor's books and assessment rolls had been certified to him, after the board of review had adjourned in each of said years, and were not completed until after it was known what the consolidated levy millage rate would be (R. 276). In 1919 this rate was not known until after September 19 (R. 628); in 1920 until after September 7 (R. 626); in 1921 until after November 17 (R. 627); in 1922

until after September 22 (R. 627). The total assessed values of the shares in all national and state banks and trust companies in the City of Des Moines in said years was as follows:

	1919.	1920.	1921.	1922.
National Banks.....	$3,099,205	$3,276,168	$3,587,657	$3,485,535
State Banks and Trust Companies	4,519,134	4,634,356	6,320,367	6,086,481

(R. 788.)

The shares of stock of 27 domestic corporations, engaged in various phases of the loan and investment business in Des Moines in said years were assessed by the city assessor as "corporation stock" on form No. 1, the same as the assessment of petitioner's stock, and as such approved by the board of review, but said assessments were by the county auditor, long after the final adjournment of the board of review in each of said years, placed upon the tax list as "moneys and credits" (R. 280, 285), and taxed at five mills on the dollar of valuation. The assessments upon such shares of said corporations totaled the following sums:

1919.	1920.	1921.	1922.
$1,822,452.00	$4,984,543.00	$6,813,030.00	$6,685,526.00

Two of these corporations, the shares of which were originally assessed as "corporation stock" but which were subsequently placed on the tax list and taxed at the five-mill rate, were Joint Stock Land Banks, organized under the Act of Congress, engaged in making loans on farm lands within the State of Iowa (R. 258, 259, 350). Fifteen other corporations made, sold and

discounted mortgage loans, secured by liens on Iowa real estate, either farm lands or city property (R. 235-252, inc., 256, 295, 323, 330, 338, 357, 340, 345, 346, 352, 365, 382, 383, 387, 389, 782, 783, 655 to 657, inc.).

Three corporations were engaged in financing public improvement contractors, making advancements to the contractors to enable them to complete their contracts and taking in payment the securities issued by counties or municipalities to the contractors. These securities were then sold to investors (R. 236, 237, 296, 324). Four of such corporations financed dealers in automobiles by the purchase of notes or acceptances, secured by liens on motor vehicles in the possession of the dealer, or in the hands of purchasers (R. 341, 375, 287, 309). Two corporations made loans secured by liens on feeder cattle (R. 780, 338). Eight of the corporations engaged in selling Government, municipal, public utility, and industrial bonds to individual investors and institutions located in Des Moines and elsewhere (R. 236, 296, 323, 340, 382, 783, 404, 305). Some of the corporations made collateral loans, both for their own account and for other investors, and discounted notes and acceptances, secured by liens on household appliances and other personal property (R. 326, 287). Substantially all phases of the loan and investment business were covered by the business operations of these corporations.

In each of said years certain foreign corporations, copartnerships, and individuals operating under trade names in Des Moines, Iowa, engaged in various phases of the loan business, were assessed by the city assessor

on the net amount of money actually used in the business as "moneys and credits" on form No. 2, and such assessments were approved by the Board of Review. After the final adjournment of the Board of Review, such assessments were placed upon the tax list and taxed at five mills on the dollar of valuation by the county auditor. Such assessments were in the total sums of

1919.	1920.	1921.	1922.
$146,263.00	$453,168.00	$278,846.00	$382,072.00

Six of these taxpayers, whose net assessments aggregated approximately $100,000.00 in each of the four years, were engaged in the "small loan" business, which consisted of making loans not exceeding $300.00, secured by chattel mortgages on household furniture and automobiles, most of the loans being payable in installments (R. 321, 623, 732, 693, 319, 691). One of the taxpayers was engaged in the business of making loans on feeder cattle, secured by chattel mortgages (R. 313). Two taxpayers were engaged in financing automobile dealers through the purchase of acceptances or sales contracts, collaterally secured by liens on automobiles in the hands of dealers or in the hands of purchasers (R. 299, 336).

During the four years in question, large numbers of individual taxpayers, residing in the City of Des Moines, held notes representing loans made by the individual secured in some instances by real estate mortgages, or other collateral—in other instances unsecured. Individual taxpayers also held bonds of rail-

roads, public utilities and industrial concerns, representing investments made by the taxpayer. Assessments upon securities of such character were uniformly made on form No. 2 of the assessment roll as "moneys and credits." The good faith indebtedness of the taxpayer was deducted from the gross amount and the net assessment was taxed at five mills on the dollar.

Evidence was introduced showing the character of loans and securities held by individual taxpayers, the net assessments of which totaled:

1919.	1920.	1921.	1922.
$1,422,274.00	$1,768,048.00	$1,587,436.00	$1,783,765.00

The petitioner, during the years in question, carried the accounts of a number of correspondent banks, located in various parts of Iowa and loaned money and handled re-discounts for such correspondents (R. 599). It made loans to automobile dealers in Des Moines and elsewhere in Iowa, secured in some instances by liens on motor vehicles in storage or in transit (R. 600); in other instances, collaterally secured by notes of purchasers of cars. In other instances, loans were made on the open, unsecured note of the dealer. The petitioner made loans to contractors engaged in the construction of public improvements and frequently accepted public improvements bonds or assessment certificates in payment of the advances to the contractors (R. 602). It made first mortgage loans on farm lands in various parts of Iowa, and on Des Moines real estate (R. 602). It made loans to enable

borrowers to purchase and feed cattle for market, secured in some instances by endorsement or by liens on the cattle, in other instances open notes evidenced such loans (R. 603). It re-discounted for correspondent banks, notes of customers, secured by chattel mortgages on cattle (R. 612). It made loans to individuals in amounts of less than $300.00; 564 such loans were made in 1919; 464, in 1920; 642, in 1921; and 692 in 1922 (R. 603). It dealt in United States Government bonds, foreign government and municipal bonds. It sold bonds of S. W. Strauss & Company, and in the years 1921 and 1922 purchased and sold to its customers, industrial, railroad and public utility bonds. It carried on the usual phases of the banking business.

The petitioner offered in evidence excerpts from the annual reports of the Comptroller of the Currency, which disclosed that during the years 1919 to 1922 National Banks in Des Moines, and other cities and towns in Iowa, held substantial amounts of loans secured by mortgages on improved real estate, loans secured by warehouse receipts covering commodities in storage and in transit, and discounted acceptances and commercial paper collaterally secured by liens on merchandise, cattle, stocks, bonds and other personal property. The reports of the Comptroller of the Currency also disclosed that during the four years National Banks in Des Moines, and other cities and towns in Iowa, held large amounts of United States Government bonds and notes, state, county and municipal bonds, railroad, public utility and other public service corporation bonds and industrial bonds (R. 661 to 680, inclusive).

The county auditor, or his deputy under his authority, in making up the tax list in each of the years involved, placed all assessments of stock of domestic corporations engaged in the loan and investment business in Des Moines thereon under the head "Moneys and Credits", and applied thereto a tax at the rate of five mills on the dollar (R. 620). The auditor testified that when he placed the assessments upon the shares of stock of such domestic corporations under the heading "Actual Value Moneys and Credits" he knew it would result in the application of a tax of five mills on the dollar and no more, and he did so with the intention that the taxes would be computed on that basis, and he knew that it would result in a substantially lesser amount of taxes upon such shares than if they were placed upon the tax list and the consolidated levy rate applied; that no shares of stock of such corporation were placed upon the tax list and taxed at the consolidated levy rate; that to the assessed value of such shares the rate of five mills on the dollar was applied by him as county auditor with the intention that the taxes would be so collected by the county treasurer (R. 280); that in so listing such shares of stock he did so under his own interpretation that the statutes of the State gave him the right, as county auditor, to make changes, and after he had taken the subject up with the legal advisers for the board of supervisors and county auditor at the time (R. 281).

With respect to the assessments of the Security Loan & Investment Company for the years 1919 and 1920, he, as county auditor, originally entered the assessed

value of the shares of the said company on the tax list under the column "Taxable Value of Personal", and the tax was computed at the consolidated levy rate. But subsequently he changed such list so as to list such shares as "moneys and credits" subject to a tax at the five-mill levy, and at the time he made such change he knew it would in fact reduce the taxes upon the shares of said company and intended that such change should take such shares from the "high levy" to "moneys and credits" which were taxed at the rate of five mills on the dollar (R. 268). Similar changes were made in the assessments of the Des Moines Joint Stock Land Bank, the Central Iowa Joint Stock Land Bank, and the Des Moines Morris Plan Bank for the year 1921, and for the latter two companies for the year 1922 (R. 269 to 273, inclusive).

Assessments against individuals, non-resident corporations and co-partnerships on account of loans of money or similar credits were all subjected to a tax of but five mills on the dollar. There was no moneyed capital, whether in the hands of individuals or in the form of shares of stock of corporations, that was in fact taxed upon the same basis with the shares of stock in banks and trust companies, *i. e.* at the consolidated levy rate (R. 285).

In the years in question, the Des Moines National Bank, a corporation organized under the national bankings laws, the Bankers Trust Company, and the Iowa Loan and Trust Company, corporations organized under the laws of Iowa, were engaged in the banking business in Des Moines. On January 20, 1923, these

banks filed bills in equity in the United States District Court for the Southern District of Iowa, against the county treasurer of Polk County, Iowa, seeking injunctions against the collection of all taxes upon their shares of stock in excess of five mills on the dollar of assessed valuation (R. 863). On May 5, 1925, a Special Master appointed in said causes filed his report in which he found as follows:

> "CONCLUSION: It is my conclusion that moneyed capital in the hands of individual citizens of this state and living in Des Moines, Iowa, was taxed at five mills on the dollar of actual valuation, and that substantial amounts of such moneyed capital was so taxed during the years 1919, 1920, 1921 and 1922, and that it was the habitual practice of the taxing officers of Polk County to so tax moneyed capital in the hands of individuals, and that it was intentionally so done by them. That the complainants are entitled to relief and that the defendant, or his successor in office, should be enjoined from collecting or attempting to collect taxes from the complainants in excess of a sum computed at five mills on the dollar of the assessed valuation of the shares of stock of each of said complainants for the four years in question, as such sums are set forth in the table in division VII hereof, together with interest upon such sums at the rate of 6% per annum from the date they were payable" (R. 990).

Exceptions were filed to the said report but were overruled, and a decree was entered by said court in

each of said suits perpetually enjoining the collection of taxes upon the said shares at rates in excess of five mills on the dollar (R. 1008 to 1012, inc.). An appeal was prosecuted to the Circuit Court of Appeals for the Eighth Circuit which upon submission affirmed the judgment of the District Court, the opinion of the Circuit Court of Appeals being dated February 28, 1927, and appears on pages 1015 to 1032, inclusive, of the Record. This opinion is reported in 18 Fed. (2d) 269. The board of supervisors of Polk County paid bills for reporters, witnesses, and attorneys' fees, court costs, printing bills, and fees of counsel for appellant in said cause (R. 779).

On November 28, 1923, the petitioner offered to pay the county treasurer the amount of taxes upon the assessed value of its shares for the years in question, computed at the rate of five mills on the dollar, with interest. On November 30, 1923, the petitioner, pursuant to demand of the delinquent tax collector (which included the threat to proceed by distress and sale of petitioner's property for the collection of said taxes and additional penalties), paid taxes and penalties as hereinbefore set forth, under protest, which was entered upon its tax receipts (R. 1039-1040). Petitioner filed with the county auditor its claim for refund of the taxes and penalties so paid, on September 14, 1925, and the board of supervisors on July 15, 1927, denied said claim for refund (R. 595). The county treasurer, after the filing of the petitioner's claim, remitted funds to the Treasurer of State, to the City Treasurer of Des Moines, to the Treasurer of the Independent School

District, and also retained funds for county purposes in the following amounts:

Year.	To Treasurer of State.	City Treasurer.	School Treasurer.	County.
1926	$502,103.00	$2,724,250	$2,972,351	$1,333,597
1927 (11 mo.).	488,715.00	2,7[illegible]33	2,880,859	1,171,223
(R. 738.)				

And the amount of money to be collected in Des Moines in 1928, as shown by the tax lists at the time of the trial was:

State	$424,295
County	1,197,457
City	2,737,872
School	3,038,901
Soldiers' Bonus (State)	32,003
Moneys and Credits	160,019
(R. 862.)	

The action was tried in the District Court of Polk County, Iowa, which rendered a decree denying to the petitioner the relief sought without findings of fact or of law, and without an opinion by the presiding judge; petitioner perfected an appeal to the Supreme Court of the State of Iowa. Said Court on September 26, 1930, rendered its opinion and entered its order confirming the judgment of the District Court (R. 1900), (232 N. W. 445). By said opinion, which was concurred in by five members of the Court, four members dissenting and filing a dissenting opinion (R. 1917), it was held that although under the statutes of Iowa the method of assessment and taxation of the shares of stock of petitioner was clearly defined and mandatory upon the taxing officials, nevertheless as to the large number

of individuals and corporations owning moneyed capital in a substantial amount which was in fact assessed and taxed as "moneys and credits" at five mills upon the dollar of actual valuation, while the shares of stock of petitioner were taxed at from five to seven times such rate, petitioner's remedy was solely by appeal from the action of the assessing bodies. That as to corporations in competition with petitioner in the said taxing district in the said years, whose shares of stock were assessed as "corporation stock" or moneyed capital, but whose assessments were changed by the county auditor to "moneys and credits", and thereby subjected to a tax at only five mills on the dollar (whereas the shares of stock of petitioner were taxed at from five to seven times such rate), the petitioner was not entitled to relief because the county auditor acted unlawfully in making such change, and although under the statutes of the State of Iowa he was the only official to whom there was remitted the power of making the tax lists, and although he acted under advice of counsel for the board of supervisors of Polk County, and although he acted intentionally and as a result of a system, his acts being so unlawful were not binding upon the State and its political subdivisions, and in so doing he was a mere usurper of authority. The Iowa Supreme Court also held that the decision of the Circuit Court of Appeals of the United States, although final, and although upon a Federal question, was not controlling upon the courts of the State of Iowa, although they should give respectful consideration to such decision.

On December 8, 1930, petitioner presented to Justice Butler of this Court its motion for an extension of time within which to file petition for writ of certiorari, and on that date he entered an order extending such time for a period of sixty days therefrom.

Reasons Relied on for Allowance of the Writ.

1. This is a cause wherein a final judgment has been rendered or passed by the highest court of the State of Iowa, by which the validity of the statutes of Iowa, as administered by the officers and agents of said state, is drawn in question on the ground of the statutes being, as so administered, repugnant to Section I of the Fourteenth Amendment to the Constitution of the United States, and the administration thereof deprived the petitioner of the equal protection of the law.

2. This is a cause wherein a final judgment has been rendered or passed by the highest court of the State of Iowa, wherein a right or privilege is specially set up and claimed by the petitioner under the Fourteenth Amendment to the Constitution of the United States and the judgment erroneously denies the petitioner such right or privilege.

3. The Supreme Court of the State of Iowa, being the highest court of said State in which a decision could be had, has decided a federal question of substance in a way not in accord with applicable decisions of this Court, including the cases of First National Bank of Hartford *v.* Hartford, 273 U. S. 548; Minnesota *v.* First National Bank of St. Paul, 273 U. S. 561;

Cummings *v.* Merchants National Bank, 101 U. S. 151; Reagan *v.* Farmers Loan & Trust Co., 154 U. S. 364; Carpenter *v.* Shaw, 280 U. S. 363; Montana National Bank *v.* Yellowstone County, 276 U. S. 499; Ward *v.* Love County, 253 U. S. 17.

4. The Supreme Court of the State of Iowa, being the highest court of said State in which a decision could be had, has decided a federal question of substance in conflict with the decision of the United States Circuit Court of Appeals for the Eighth Circuit involving the same questions and the same facts, being the case of Munn, Treasurer *v.* Des Moines National Bank, and two other cases, 18 Fed. (2d) 269.

5. The Supreme Court of Iowa, being the highest Court of the State in which a decision could be had, has decided important questions of general law in a way untenable and in conflict with the weight of authority and has thereby deprived the petitioner of rights arising under the Fourteenth Amendment to the Constitution of the United States, in that the Supreme Court of Iowa ruled that the State was not bound by the acts of its duly constituted officers in administering the laws and statutes of the state so as to work a trespass upon the rights of the petitioner and to deprive the petitioner of the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States.

6. The decision and judgment of the Supreme Court of Iowa, being the highest court of said State in which a decision in said cause could be had, denies to petitioner the equal protection of the law, contrary to the

Fourteenth Amendment to the Constitution of the United States, in that in the administration of the statutes of Iowa by officers of the State and its political subdivisions there was an intentional, systematic, general, and habitual method or plan of taxation whereby large and substantial amounts of other moneyed capital within the meaning of Section 5219 of the Revised Statutes of the United States were taxed at from one-fifth to one-seventh as much as the taxes imposed upon the assessed value of the shares of petitioner.

7. The decision and judgment of the Supreme Court of Iowa, being the highest court of said state in which a decision could be had, denies to petitioner the right to have its shares taxed at the uniform rate imposed upon other moneyed capital in the hands of individual citizens. The record affirmatively discloses that the denial of such right was the result of a deliberate, intentional, systematic and habitual plan in the administration of the taxing laws of Iowa, and the acts of the taxing officers therefore deprive the petitioner of rights guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Specification of Errors.

Your petitioner further shows that the final decision and judgment of the Supreme Court of Iowa, affirming the judgment of the District Court of Polk County, Iowa, is erroneous in the following respects:

a. Because the said decision and judgment of the Supreme Court of Iowa denies to petitioner the equal

protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States, in that in the administration of the statutes of Iowa by officers of the State and its political subdivisions there was an intentional, systematic, general, and habitual method or plan of taxation whereby large and substantial amounts of other moneyed capital within the meaning of Section 5219 of the Revised Statutes of the United States were taxed at rates from one-fifth to one-seventh as much as the taxes imposed upon the assessed value of the shares of the petitioner.

b. Because by said decision and judgment the said Supreme Court of Iowa held that there was no intentional, systematic, general, and habitual method or plan of taxation in the administration of the statutes of Iowa by officers of the State and its political subdivisions whereby large and substantial amounts of other moneyed capital within the meaning of Section 5219 of the Revised Statutes of the United States were taxed at rates of from one-fifth to one-seventh as much as the taxes imposed upon the assessed value of the shares of petitioner.

c. Because by said decision and judgment the Supreme Court of Iowa held that the acts of the county auditor in making the tax list, or in making changes in the tax list so as to subject the shares of stock of competing corporations to a tax from one-fifth to one-seventh as much as the tax to which petitioner's shares were subjected were illegal and void acts of a merely ministerial or clerical officer, were a mere nullity, were the result of usurped authority, and were not the acts

of the State taken through its duly constituted officers, and were not binding upon it.

d. Because the said decision and judgment of the Supreme Court of Iowa held that the State and all of its authorized officials "have acted in the utmost good faith and in accordance with the constitutional and statutory rights of petitioner."

e. Because by said decision and judgment the Supreme Court of Iowa held that there was no discrimination in the levy or assessment as between the petitioner and competing corporations and that the State had not knowingly and wilfully discriminated in the collection of taxes.

f. Because the said decision and judgment of the Supreme Court of Iowa denied to petitioner its rights arising under the Fourteenth Amendment to the Federal Constitution and Section 5219 of the Revised Statutes of the United States upon the ground, in part, that it did not appear that the illegal acts of the county auditor were ever called to the attention of the board of supervisors, the executive council, the department of justice, the legislature, or any of the authorities of the State who had any power of supervision or duty to enforce correction of the misfeasances of the county auditor or county treasurer.

g. Because the decision and judgment of the Supreme Court of Iowa held that it was not bound by the decision of the Circuit Court of Appeals for the Eighth Judicial Circuit in Munn *v.* Des Moines National Bank, and Munn *v.* Bankers Trust Company, 18 Fed. (2)

269, which decision became final, and which decision was of the identical questions and upon the identical facts involved in this case and constituted an adjudication binding upon respondents.

h. Because said decision and judgment of the Supreme Court of Iowa held that as to other moneyed capital in the hands of individuals and foreign corporations assessed by the assessor, reported by him to the board of review, approved by that board, entered upon the tax books, and so returned to the county auditor as "moneys and credits" and subjected to taxes at five mills on the dollar of assessed valuation, petitioner had an available remedy by appeal from the board of review, and that such remedy was exclusive.

A certified copy of the entire record in said suit, including the record and proceedings and papers filed or had in the Supreme Court of the State of Iowa, is herewith furnished, attached to, and made a part of this petition, in compliance with Rule 38 of the Rules of this Court.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of Iowa, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all the proceedings in the case numbered and entitled on its docket No. 39844, Central State Bank, Appellant, *v.* J. M. Stewart *et al.*, Appellees, and that the said decree and judgment of the Supreme Court of Iowa may be reversed

by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just. And your petitioner will ever pray.

CENTRAL STATE BANK,
By J. G. GAMBLE,
A. B. HOWLAND,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No.

CENTRAL STATE BANK, PETITIONER,

v.

J. M. STEWART ET AL., RESPONDENTS.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinion of the Court Below.

The opinion of the Supreme Court of Iowa has not been officially reported. It was rendered on September 26, 1930, and appears in the Record beginning at page 1900. It has been reported in 232 N. W. 445.

II.

Jurisdiction.

1. The jurisdiction of this Court is sustained by Judicial Code Section 237 as amended by the Act of February 13, 1925, 43 Stat. 938.

2. The date of the judgment to be reviewed is September 26, 1930 (R. 1960). Application for extension

of time within which petition for a writ of certiorari might be filed in this cause was made to Justice Butler on December 8, 1930, and an order extending such time for sixty days from and after December 8, 1930, was on that date granted by Justice Butler (R. 1967).

3. There has already been stated in the preceding petition under "Summary Statement of the Matter Involved" and "Reasons Relied on for the Allowance of the Writ" (pp. 1, 21) the nature of the case and the rulings below which were such as to bring the case within the jurisdictional provision relied on, and the same are hereby adopted and made part of this Brief.

4. The cases believed to sustain said jurisdiction are as follows:

First Nat. Bank of Hartford *v.* Hartford, 273 U. S. 548.

Minn. *v.* First Nat. Bank of St. Paul, 273 U. S. 561.

Cummins *v.* Merchants Nat. Bank, 101 U. S. 151.

Green *v.* L. & I. Ry. Co., 244 U. S. 499.

Reagan *v.* Farmers Loan & Trust Co., 154 U. S. 364.

Carpenter *v.* Shaw, 280 U. S. 363.

Montana Nat. Bank *v.* Yellowstone County, 276 U. S. 499.

Ward *v.* Love County, 253 U. S. 17.

III.

Statement of the Case.

This has already been stated in the preceding petition under "Summary Statement of the Matter In-

volved" (p. 1), which is hereby adopted and made part of this Brief.

IV.

Specification of Errors.

Specification of Errors (*a*) to (*i*), inclusive, have been set forth in the preceding petition (p. 23), and are hereby adopted and made part of this Brief.

V.

Summary of the Argument.

The Fourteenth Amendment to the Constitution of the United States protects taxpayers of a state against systematic, intentional and arbitrary action on the part of officers of a state, or its political subdivisions, in the administration of the taxing laws of the state. The decision below is contrary to and in conflict with the decisions of this and other Federal courts.

The decision of the Iowa Supreme Court that the State, and its subdivisions were not bound by the Acts of the County Auditor of Polk County, in the performance of duties enjoined upon him by statute, is clearly untenable and will not support a denial of rights arising under and guaranteed by the Fourteenth Amendment of the Constitution of the United States.

The decision of the Iowa Supreme Court that petitioner's exclusive remedy, as to the moneyed capital

assessed by the assessor as "moneys and credits" and taxed at five mills on the dollar, was by appearance before and appeal from the Board of Review is untenable, and denies petitioner the equal protection of the law in violation of the Fourteenth Amendment.

ARGUMENT.

By a Five to Four Decision, the Supreme Court of Iowa Has Denied to the Petitioner Substantial Rights Arising Under and Guaranteed it by the Fourteenth Amendment to the Constitution of the United States.

Under the State and Federal constitutions, the legislature of Iowa had the undoubted power of making reasonable classifications of property for taxing purposes. The Legislature of the State exercised this power by the enactment of Sections 1310, 1322 and 1322-1*a*, Code Supplement of 1913, and placed shares of stock in national and state banks, loan and trust companies and "all moneyed capital within the meaning of Section 5219 of the Revised Statutes of the United States" in one class. The Legislature directed that all property in the class should be taxed at a uniform rate, *i. e.*, the consolidated levy rate applied to twenty per cent of the assessed actual value of the shares or the moneyed capital. The State, by these statutes, has adopted and made a part of the law of Iowa, the classification made by the Congress of the United States as to national banks in Section 5219 of the Revised Statutes.

Notwithstanding the classification made by these statutes requiring uniformity in the taxation upon the

shares of national banks, state banks, loan and trust companies, and "moneyed capital," the record establishes in great detail that in each of the years in question, relatively large and material amounts of moneyed capital were deliberately, intentionally, systematically and habitually taxed at rates from one-fifth to one-seventh the rates imposed upon the shares of the petitioner.

Indeed, the majority opinion of the Supreme Court of Iowa recognizes and concedes that in each of the years involved in this case, there were in the City of Des Moines, a large number of domestic corporations employing moneyed capital in direct competition with the petitioner, the shares of which corporations constituted "other moneyed capital," and a large number of persons and a few foreign corporations and copartnerships, which were employing moneyed capital, and all of this moneyed capital was taxed at the rate of five mills on the dollar of actual valuation as "moneys and credits."

This moneyed capital to which we have referred was by the majority opinion of the Iowa Supreme Court placed in two classes:

(*a*) Competing capital represented by shares of domestic corporations, the assessments upon which were made by the assessor, approved by the Board of Review, entered upon the assessor's books and returned to the county auditor as "corporation stock" identical in form with the assessments upon the shares of the petitioner. The discrimination with respect to these

shares resulted from the subsequent acts of the county auditor in placing the assessments upon the tax list as "moneys and credits" and applying thereto the five mill rate.

(*b*) Competing capital in the form of notes, bonds, mortgages and other evidences of indebtedness in the hands of individuals, co-partnerships and foreign corporations, the assessments of which were made as "moneys and credits" approved by the Board of Review, entered upon the tax books and the five mill rate applied thereto.

We desire to consider the questions presented in the light of the assessments of these classes of competing capital in the order stated.

(*a*) In each of the years involved, petitioner, as required by statute, made sworn statements to the assessor for the assessment of its shares of stock. The assessor assessed such shares as "corporation stock," made up the assessment rolls accordingly, fixing the value on the basis of the sworn statements. This assessment was approved by the board of review, and the assessor's books were made up and returned to the county auditor in conformity with the sworn statements and assessment rolls. The county auditor so entered them upon the tax books, fixing the taxable value at twenty per cent of the actual value, and applied to such taxable value the consolidated levy for the respective years, which varied from 137.8 to 164 mills.

In so doing, the assessor, board of review, and the county auditor performed purely ministerial acts imposed by mandatory statute. As said by the Supreme Court of Iowa in First National Bank of Remsen *v.* Hayes, County Auditor, 186 Iowa, 892:

> "Enough has been said to indicate that the duty performed by the assessor in ascertaining the value of bank stock is merely ministerial in its nature. All exacted of him is accurate computation. In estimating the value of other property, he is required to determine its value according to his best judgment, and therein exercises a quasi-judicial function. See Talley *v.* Brown, 146 Iowa, 360. A ministerial act has been defined as 'one which a person or board performs upon a given state of facts, in a prescribed manner, in observance of the mandate of legal authority, and without regard to or the exercise of his own judgment upon the propriety of the act being done.' . . .
>
> "Here, the assessor is merely required to make computation from the statements furnished him, and must have, in the performance of his duty as assessor, assessed the shares of stock in the bank in accordance with computations actually made, and therein performed purely ministerial duties, and he should have assessed the bank stock in accordance with such computation. Whether he made a mistake in computation or undertook to exercise his judgment in ascertaining the value of the shares of stock is not material. In either event, the error in the assessment was such as contemplated in Section 1385-*b* of the Code Supplement, 1913,

and the auditor acted within his authority in making the corrections."

See also Security Savings Bank *v.* Board of Review, 189 Iowa 463; Avoca State Bank *v.* Burke, County Auditor, 193 Iowa 1055.

During these same years a large number of domestic corporations employing the competing capital included in this class made like sworn statements to the assessor, who used the same classification and assessment, and made up and returned to the county auditor the assessment rolls and the assessor's books in indentically the same form, and on the same basis as in the case of petitioner's stock.

Either before or after the tax books made by the county auditor had passed into the hands of the treasurer, but before payment of the taxes, the county auditor made entries therein so that the assessments against such competing capital were extended on the tax books as "moneys and credits," and applied thereto the five-mill levy on the dollar of actual valuation, under Section 1310, Code Supplement 1913, instead of the application of the consolidated levy upon 20 per cent of the valuation, as was done in the case of petitioner, and this resulted in a much larger tax upon petitioner than upon such competing capital.

"The tax law as it leaves the legislative hands may not be obnoxious to any challenge, and yet the officers charged with the administration of that valid tax law may so act under it in the matter of assessment or collection as to work

an illegal trespass upon the property rights of the individual."

Reagan *v.* Farmers Loan and Trust Company, 154 U. S. 362 at 390; Chicago and Northwestern Railway Company *v.* Osborne, 265 U. S. 14; Sioux City Bridge Company *v.* Dakota County, 260 U. S. 441; Munn *v.* Des Moines National Bank, *supra.*

In Cummings *v.* Merchants National Bank, 101 U. S. 153, this Court said:

> "Independently of this Statute (5219 R. S.), however, we are of opinion that when a rule or system of valuation is adopted by those whose duty it is to make the assessment, which is designed to operate unequally and to violate a fundamental principle of the Constitution, and when this rule is applied not solely to one individual, but to a large class of individuals or corporations, that equity may properly interfere to restrain the operation of this unconstitutional exercise of power."

In Sunday Lake Iron Co. *v.* Wakefield, 247 U. S. 350, it is said:

> "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. And it must be regarded as settled that intentional systematic undervaluation by state officials of other tax-

able property in the same class contravenes the constitutional right of one taxed upon the full value of his property.''

The act of the county auditor and his deputy in placing the assessments on the shares of domestic corporations, employing capital in competition with petitioner, upon the tax list as ''moneys and credits'' and thereby subjecting such competing capital to rates of taxation much less than those imposed upon the shares of petitioner was an unlawful change of classification by the auditor. Ft. Madison Security Company *v.* Maxwell, et al., 202 Iowa, 1346.

Thus by the act of the auditor, a public official charged with the duty of preparing the tax list showing the amounts of taxes to be collected by the Treasurer, the shares of petitioner have been subjected to a clear discrimination when compared to the taxes imposed upon a relatively material part of ''other moneyed capital,'' as that term is defined by Section 5219 of the Revised Statutes, as construed by this court in First National Bank of Hartford *v.* City of Hartford, 273 U. S. 548; Minnesota *v.* First National Bank of St. Paul, 273 U. S. 561; Merchants National Bank of Richmond *v.* Richmond, 256 U. S. 635; Munn, County Treasurer *v.* Des Moines National Bank and Munn, County Treasurer *v.* Bankers Trust Company, 18 Fed. (2d) 269. The last two cases involved alleged discrimination in taxation against the shares of state and national banks and in favor of ''other moneyed capital,'' in the same taxing district, in the same years involved in this case. Injunctions were

issued in those cases enjoining the collection of taxes upon bank shares in excess of the five mill rate, and the decision became final, since no effort was made to have it reviewed by this court. See 18 Fed. (2d) 269.

That the auditor, in making these changes in the tax list so as to subject the shares of petitioner to a clear discrimination, acted intentionally, systematically and with the purpose of bringing about the taxation of such other moneyed capital at grossly favorable rates, is abundantly established by the record. This is shown by the direct admissions of the county auditor who repeatedly testified, both on direct and cross examination, that he intended to subject the petitioner's shares to taxation at the consolidated levy rate applied to 20% of the assessed value, and the shares of other corporations engaged in the loan and investment business to taxation at the five mill rate. It is undisputed that this action was taken after the auditor had the benefit of the advice of legal counsel for the County Board of Supervisors. In the four years involved the auditor testified that there was no capital in the county taxed at rates as high as those imposed upon petitioner's shares "except the capital of other banks." Thus there is undoubted support for the statement of the four justices of the Iowa Supreme Court who concurred in the dissenting opinion, in which it was said:

> "It is shown by the record that the capital of national banks in the city of Des Moines during the years in question was about three million dollars, while that of state banks was

from four and one-half to six million dollars. The assessments upon the shares of stock found from the evidence to be competing institutions during said years, varied from about one and one-half millions in 1919 to an excess of five millions in 1922, and, under the rule laid down by the italicized portion of First National Bank of Hartford *v.* City of Hartford, supra, there has been a clear violation of Section 5219 of the Revised Statutes of the United States.

The action, hereinbefore mentioned, of the county auditor was intentionally done. It applied to all of the assessments upon the shares of stock of the competing corporations. Therefore, within the meaning of the authorities from which quotations are hereinbefore given, to wit, Reagan *v.* Farmers Loan & Trust Company, 154 U. S. 362, 14 S. Ct. 1047, 38 L. Ed. 1014; Sioux City Bridge Company v. Dakota County, 260 U. S. 441, 43 S. Ct. 190, 67 L. Ed. 340, 28 A. L. R. 979; Cummings *v.* Merchants National Bank of Toledo, 101 U. S. 153, 25 L. Ed. 903; Raymond *v.* Chicago Union Traction Company, 207 U. S. 20, 28 S. Ct. 7, 52 L. Ed. 78, 12 Ann. Cas. 757, and the other cases cited in connection therewith, an illegal discrimination has been worked against the appellant national banks and their shareholders by systematic, intentional, wrongful and arbitrary administration of the law. In order for the appellant national banks to be entitled to relief, it is not a prerequisite that the action of the county auditor was done with intent to injure said banks. See Taylor *v.* L. & N. R. Co. (C. C. A.) 88 F. 350."

Indeed, the majority opinion of the Supreme Court of Iowa in this case recognizes the existence of this

clear discrimination against petitioner's shares in favor of a relatively material amount of other moneyed capital within the meaning of the Revised Statutes, but undertakes to avoid the application of the holdings of this and other federal courts to like cases, and denies to petitioner the recovery of the taxes so illegally exacted from it because it is said that the acts of the county auditor were illegal and void acts of a merely ministerial, or clerical officer or employe, and the result was not one of bad faith, intent, or willfulness on the part of those who as its duly constituted officers represented the state; that the auditor's acts in making the tax list or in making changes in the tax list so as to subject the shares of stock of such competing corporations to a tax so much less than the tax to which the shares of petitioner were subjected were a mere nullity, and that the auditor was merely usurping authority and therefore his acts were not the acts of the state taken through its duly constituted officers, and were not binding upon it.

Such holding was but a declaration of general law concerning the powers of the county auditor and is wholly untenable for the following reasons: It was provided by Section 1072, Code of Iowa Supplement, 1913, that "there shall be elected in each county at general election in 1906 and in each even-numbered year thereafter an auditor * * * who shall hold office for the term of two years or until their successors are elected and qualified." The county auditor is required by statute on or before the first day of January in each year to transcribe the assessments of

the several townships, towns, and cities into a book to be provided at the expense of the county for that purpose, to be known as the tax list, properly ruled and headed with distinct columns in which shall be entered the names of the taxpayers, description of lands, number of acres and value, number of town lots and value, value of personal property, and each description of tax, with a column for polls and one for payments, and shall complete the same by carrying out the totals and footings of columns. Code of Iowa, Supplement 1913, Section 1383. The county auditor is required, before the 31st day of December of each year, to deliver the tax list to the county treasurer, and such list shall be sufficient authority for the treasurer to collect the taxes therein levied. Code of Iowa 1897, Section 1387. The county auditor may correct any error in the assessment or tax list, or may assess and list for taxation any omitted property. Code of Iowa, Supplement 1913, Section 1385-*b*. All taxing districts in the state, including townships, school districts, cities, towns, and counties, are required to certify to the county auditor the money needs of the district, and the rate of taxation shall be based upon the adjusted taxable valuation of such taxing district for the preceding year, and shall be computed and spread upon the records by the county auditor, and spread upon the tax list in his office. Chapter 343, Laws 37th G. A. The county treasurer is required by statute to collect the taxes, and the list shall be his authority and justification against any illegality in the proceedings prior to receiving the list. Code of Iowa 1897, Section 1390.

Neither the local assessor nor the board of review have any duty to perform under the statutes of Iowa with respect to the quantity of the tax to be applied against the value of the property assessed by them. Their function is one of valuation. Nor does the county treasurer have any duty to perform with respect to the quantity of the tax to be applied against the assessed value of the property. His duty is one of collection. The basic factors which result in the fixation of the rate of tax applied against assessed valuations come either from taxing districts or statutes of the state, and all are required to be reported to and computed by the county auditor, whose duty it is to make the tax list, which constitutes the tax bill which is the foundation of the tax lien, and which imposes, once it is lodged in the hands of the county treasurer, the obligation of payment from the taxpayer. If error creeps into the tax list, either as a result of inadvertence or intention, the law imposes the duty of correction upon the county auditor. The treasurer has no authority to correct an error in the tax list, but is required to give receipt to taxpayers upon the tender of the amount shown by the tax list, and is required to furnish to the taxpayers the charge against them reflected by the tax list. Code of Iowa 1897, Sections 1396-7.

The mere assessment of values imposes no tax. The collection of tax payments is an act which can only be consummated after the imposition of a tax. Taxes are imposed by law, but the law in Iowa remits to the county auditor the application of the levy to the values,

and he is the only agent of the state or any of its political subdivisions invested by law with authority to impose the ultimate amount upon the taxpayer which represents his due proportion of the cost of government. It is an essential step in the fixation of tax liability in Iowa that the county auditor prepare the tax list. Perhaps he has no duty imposed upon him by law so important and so far-reaching in its effect as this duty. To say that he is not a duly constituted agent of the state and its political subdivisions in connection with the imposition of taxes such as involved in this case is to deny the express and unequivocal language employed by the legislature of the state in erecting the machinery for the exaction of the funds necessary for conducting the business of the government.

Indeed, the Supreme Court of Iowa in its prior decisions has recognized the county auditor as a duly constituted agent of the state and its political subdivisions in connection with the imposition of taxes, and awarded relief where the county auditor in the performance of such duties acted illegally. In Northwestern Bank of Ireton *v.* Van Roekel, 202 Iowa 237, the court had under consideration the action of the county auditor in increasing the assessment of the Northwestern Bank, a private bank, by the sum of $50,000. It held that the auditor in increasing the assessment departed from the objective of the legislature of the state to obtain substantial uniformity in the method of assessing state, national and private banks, and affirmed the judgment of the district court

setting aside such additional assessment made by the county auditor. Involved in the case was the question of the taxation of costs, and in considering that portion of the district court's judgment which taxed the costs of the proceeding to the county auditor, the court said:

> "We do not think that the costs should have been taxed against the auditor personally. *He acted officially and in good faith, and under the advice of counsel.*" (Italics ours.)

And the Supreme Court of Iowa in Fort Madison Security Company *v.* Maxwell, 202 Iowa 1346, held that the county auditor of Lee County acted illegally and beyond his power in listing upon the tax list the shares of stock of the Fort Madison Security Company as "moneyed capital" when such shares had been assessed by the assessor as "moneys and credits", and awarded relief to the Fort Madison Security Company by reason of the illegal and unauthorized act of the county auditor.

Furthermore, the Supreme Court of Iowa in the cases of First National Bank of Remsen *v.* Hayes, *supra,* and Avoca State Bank *v.* Burke, *supra,* clearly recognized the acts of the county auditor as acts of a duly constituted agent of the state and its political subdivisions, because it affirmed the imposition of additional taxes by reason of the acts of the county auditor.

The Iowa court, however, further predicated its denial of relief to petitioner, in part upon the state-

ment that petitioner was the acting party and that it did not appear from the record that the illegal acts of the auditor were ever called to the attention of the board of supervisors, the executive council, the department of justice, the legislature, or any of the authorities of the state who had any power of supervision or duty to enforce correction of the misfeasances of the county auditor or the county treasurer. There is no statutory provision in Iowa imposing any obligation upon petitioner to call to the attention of the parties referred to the illegal acts of the auditor, unless it arises under the statute relating to the refund of taxes, where the action of the board of supervisors is required to be invoked. The petitioner fully complied with this provision, since the illegal acts of the auditor were repeatedly, and at great length set forth in the claim filed with the board of supervisors, and the illegality of the taxes demanded and exacted by the county treasurer from petitioner was further called to the attention of the county treasurer in the protest filed with him at the time of the payment of such taxes and penalties. Furthermore, the county auditor is shown by the record to have consulted the legal advisers for the board of supervisors and himself at the time of making the entries on the tax list resulting in the discriminatory taxation. There is no provision of law which invests the executive council of the State of Iowa with any jurisdiction over the acts of the county auditor, and there is no means provided by law through which petitioner could have appealed to the legislature in this connection.

This effort on the part of the Supreme Court of Iowa, as reflected by the majority decision, to deprive petitioner of its legal right to recover money unlawfully exacted from it by a discriminating tax on its shares, made after the tax was exacted still leaves the money illegally exacted in the treasury of the state and its political subdivisions, and will not be permitted to preclude the right of recovery by petitioner. Montana National Bank *v.* Yellowstone County, 276 U. S. 449.

Moreover, since by virtue of the facts disclosed in the record the petitioner's shares have been taxed at a greater rate than other moneyed capital, there was the assertion and proof of the existence of a federal right, and whether this federal right was denied or not given due recognition creates in itself a federal question, and, as said by this Court in Carpenter *v.* Shaw, 280 U. S. 363, the denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is in itself a contravention of the Fourteenth Amendment.

In this record it is conclusively shown that not only were the original taxes exacted of petitioner under compulsion, but that in addition, interest and penalties in the enormous sum of $12,198.28 were demanded and paid under the threats of the imposition of additional penalties and also of the seizure by distress and sale of the property of petitioner. Under such circumstances, as said in Ward *v.* Love County, 253 U. S. 17, "No statutory authority was essential to enable or require the county to refund the money." Although,

by the terms of Section 1417 of the Code of Iowa, 1897 it was provided:

> "The Board of Supervisors shall direct the treasurer to refund to the taxpayer any tax or portion thereof found to have been erroneously or illegally exacted or paid, with all interest and cost actually paid thereon."

And the Supreme Court of Iowa in Steele *v.* Madison County, 198 Iowa 902, had held that the proper procedure to enforce rights under this statute is by mandamus to compel the board of supervisors to order a refund thereof. See also Murphy *v.* Berry, 200 Iowa 974; Fort Madison Security Company *v.* Maxwell *et al.*, 202 Iowa 1346; Commercial National Bank *v.* Board of Supervisors, 168 Iowa 501.

(*b*) In each of the years involved there were in the City of Des Moines a large number of persons, and a few foreign corporations, who were employing moneyed capital in competition with petitioner. The assessor classified and assessed this competing capital as moneys and credits. He made up the assessment rolls and assessor's books accordingly, and returned them to the county auditor. The county auditor extended these assessments upon the tax books as moneys and credits, and applied to them the five mill levy upon the net valuation, which resulted in a much lesser tax than if said moneyed capital had been subjected to taxation at the same rate as that imposed upon petitioner's shares. After making the assessments of moneyed capital, the assessor submitted the same to and they were approved by the board of review, which

was composed of the city council of the City of Des Moines.

Although admitting the existence of a clear discrimination in connection with the taxation of such moneyed capital, the Supreme Court of Iowa denied to petitioner a recovery for the reason that under its holding petitioner was required to appear before the board of review and object to the discriminatory assessment of such moneyed capital in the hands of such large number of persons and foreign corporations, and to appeal from the action of the board of review to the District Court of Iowa. It was held that this was the exclusive remedy afforded to petitioner by the statutes of Iowa. Complaint as to the assessment of petitioner's shares would have availed nothing, because as we have heretofore pointed out, the assessor and the board of review performed only ministerial duties under a mandatory statute, and in so far as the assessment of petitioner's shares was concerned, were limited merely to the computation of the value of such shares based upon the sworn statements required to be furnished by petitioner.

The record shows that the moneyed capital included in this class was held by several hundreds of persons, and the amount thereof in the aggregate was several millions of dollars. The time fixed by the statutes for a taxpayer to make complaint before the board of review was only a few days, and the Supreme Court of Iowa had held that the taxpayer coming before the board of review for relief must state his grievance

"with sufficient particularity and must specify his complaint with such certainty to enable the tribunal supposing it to possess ordinary intelligence, to comprehend and understand the matters of which complaint is made, and to grant the particular relief sought for in the complaint. He is not entitled to have any question determined on appeal except such as he called the tribunal to determine in the first place". *First National Bank v. City of Council Bluffs,* 182 Iowa 107.

The complaint must present the alleged errors "with such facts as may lead to their correction". The city council of Des Moines was not a judicial body. The competitors of petitioner who had escaped four-fifths to five-sixths of the taxes they should have paid, and their employees, were not very likely to volunteer testimony or evidence to sustain the claims of petitioner, and the city council had no power to issue subpœnas to compel them to testify. It was neither practical nor possible for the shareholders of petitioner to have searched out, learned, and stated to the city council within the times required by statute, the errors of which they complained, with such facts as may lead to their correction—much less to have had the city council so determine the question. As stated by Circuit Judge Sanborn in *Munn v. Des Moines National Bank, supra:*

> "In our opinion the facts of these cases, some of which have now been recited, clearly except them from the operation of the proposition that they must exhaust their remedy before the administrative board, because that remedy was not only inadequate but necessarily impractical and

futile, and the Court below had plenary jurisdiction in equity to hear and decide the questions in these cases and to grant adequate relief to complainants."

Furthermore, this Court in Sioux City Bridge Co. *v.* Dakota County, *supra,* which involved the taxation of the property of petitioner in that case by the State of Nebraska on a basis that denied the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States, and in answer to the holding of the Supreme Court of Nebraska that the petitioner had no remedy except "to have the property assessed below its true value raised rather than to have property assessed at its true value reduced", said:

> "The conclusion in these and other Federal authorities is that such a result as that reached by the Supreme Court of Nebraska is to deny the injured taxpayer any remedy at all, because it is utterly impossible for him by any judicial proceeding to secure an increase in the assessment of the great mass of under-assessed property in the taxing district."

See also *Green v. L. & I. Ry. Co.,* 244 U. S. 499; *Taylor v. L. & N. Ry. Co.,* 88 Fed. 350.

And so we say that the holding of the Supreme Court of Iowa in this case in this respect is the equivalent of a denial to the petitioner of any remedy at all, and where, as here, there is involved a recovery of taxes exacted in violation of the law or Constitution of the United States by compulsion, it, as said by this Court

in *Ward v. Love County, supra,* requires no statutory authority as an essential to enable or require the county to refund the money. See also *Carpenter v. Shaw, supra.*

In the majority opinion of the Supreme Court of Iowa it is said "it is only by inference that it can be said that the domestic corporations so owning and employing the competing moneyed capital admitted to have existed in the taxing district of Des Moines in the years involved have paid taxes only in accordance with the changes made by the auditor." But this statement is not sustained by the record. The tax lists for each of the years involved were in evidence. The statutes required the county auditor in the preparation of the tax lists to provide a separate column showing the date of payment. Page 383 of Exhibit 261, being the tax list for 1919, is reproduced in the record as a typical example of the tax list, and shows the payment by the Security Loan and Investment Company of taxes computed on the five-mill basis on March 31, 1920, and on September 30, 1920, and the payment by Jesse F. Stevenson Company of taxes computed on the five-mill basis on the same dates. E. R. Bennett, one of the respondents in the case, and who was county treasurer at the time of payment testified that he had instructed his deputies and clerks to accept money for taxes as shown by the tax books whenever the amount offered was the amount shown to be due by the tax lists. The county auditor testified that when he made the tax lists, and placed thereon the shares of such corporations employing competing moneyed capital, he did so

with the intention that the taxes would be so collected at the five-mill levy by the county treasurer's office, and that there were no assessments on the shares of stock of any corporation in the city of Des Moines during the years 1919 to 1922, other than the shares of banks and trust companies which were taxed at a rate in excess of five mills on the dollar, nor was there any moneyed capital, whether in the hands of individuals or in the form of shares of stock of corporations, that was in fact taxed on the same basis with the shares of stock in banks and trust companies. We have heretofore pointed out that under the statutory provisions in effect at the times involved in this suit, the county treasurer was required by statute to collect the taxes as entered upon the tax lists, and the tax lists constituted his authority for such collection. And so, we say that the statement in the majority opinion of said Court is not sustained by the record.

It is true, of course, that there could be, as a result of system and design, a discrimination in the collection of taxes which would fall within the prohibitions contained in Section 5219 of the Revised Statutes of the United States, and the Fourteenth Amendment to the Constitution of the United States. But it is not true that such illegal discrimination can only result from an intentional and systematic failure on the part of the state and its political subdivisions to ultimately collect taxes from all taxpayers in the same class at the same rates. The prohibition upon the power of the state contained in the Fourteenth Amendment to the Constitution relates to the imposition of

taxes as the result of an intentional, systematic, habitual, and arbitrary action of the officials of the state and its subdivisions. This discrimination results when the state or its agents are authorized to demand the sums of money as taxes pursuant to the preparation of the tax bills in accordance with the methods prescribed by statute. And that is just what happened at the time the county auditor in each of these years lodged the tax lists with the county treasurer, because without any further action on the part of any agent of the state or its political subdivisions the amounts shown on the tax lists became charges and liens, if not paid, not only against the petitioner, but against all other taxpayers for taxes levied against them. And it is merely an avoidance of the decision of the Federal rights, asserted in this instance, upon an untenable ground to say that when the petitioner was subjected to the charge or charges in each of these years by the lodging of the tax lists with the county treasurer, and when the other taxpayers employing competing moneyed capital were subjected to the grossly discriminatory taxes in each of these years by the lodging of the tax lists with the county treasurer, that the rights of the petitioner arising under the Federal laws and the Federal Constitution were not then and there infringed by virtue of the acts of the officials of the state and its subdivision so as to give to the petitioner the right to the relief claimed.

We have heretofore called to the Court's attention the decision of the Circuit Court of Appeals of the

Eighth Judicial Circuit in the case of Munn *v.* Des Moines National Bank, particularly with respect to its binding effect upon the Supreme Court of Iowa. There were involved in that case Federal questions. The decision of the Circuit Court of Appeals became final, since no effort was made to procure a review thereof by this Court. The Supreme Court of Iowa in Des Moines National Bank *v.* Fairweather, 191 Iowa at p. 1244, expressly recognizes the binding effect of such a final decision upon a Federal question.

But we desire the Court to consider the effect of the judgment in the case of Munn *v.* Des Moines National Bank *et al., supra,* from another aspect. That case, as we have shown, involved the taxation of the shares of stock of the Des Moines National Bank, the Bankers Trust Company, and the Iowa Loan and Trust Company, during the years 1919 to 1922 inclusive, which are the same years as are involved in this case. Each of those institutions was engaged in the commercial banking business in Des Moines, Iowa, the location of the business of petitioner. There were involved in those cases Federal questions, namely: the violation through the method of taxation employed by the taxing officials of the State of Iowa and its political subdivisions of the provisions of Section 5219 of the Revised Statutes of the United States, and of the constitutional rights of the plaintiffs in those cases. These Federal questions were resolved in favor of the plaintiff banks in those cases, and the decision of those cases is a finality. So final was the decision that the taxes which were ultimately exacted from the plain-

tiffs therein was at the rate of only five mills on the dollar of assessed valuation in each of the years involved. There can be no question of the right of the Federal courts to have decided the Federal questions presented by those cases, nor of the fact that the Federal courts of final resort did decide those questions, and the decision was in favor of the plaintiff banks, who were direct active banking competitors of the petitioner. The decision and judgment in those cases became binding upon the parties thereto and upon everyone else, for that judgment, being a finality, could not be further reviewed. So here we have the taxation in the years 1919 to 1922 inclusive of the shares of stock of a national and two state banks which were in direct banking competition with the appellants at the rate of five mills on the dollar of assessed valuation. True, this taxation was influenced by and the result of the final decision of the United States Courts, but it was none the less real and this does not alter the fact that shares of stock of competing banks in Des Moines were taxed at five mills on the dollar in the years involved in this suit, nor was such result any more brought about by the decision of a Federal question than was the result of the application of the decision of Home Savings Bank *v.* Des Moines, 205 U. S. 503, to the case of First National Bank of Estherville *v.* City Council, 150 Iowa 95, where it was held that the holding in the former case was final and conclusive in the latter because it was the final decision of a Federal right by the United States Courts. Such being the state of the law as announced by these deci-

sions, and such being the facts as to which there can be no dispute, we insist that petitioner was entitled to the relief sought.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the errors committed by the Supreme Court of Iowa in rendering its decision and judgment may be corrected, and that petitioner may have the benefit of the rights to which it is entitled under the laws and Constitution of the United States, and that to such an end a writ of certiorari should be granted and this Court should review the decision of the Supreme Court of Iowa, and finally reverse it.

Respectfully submitted,

J. G. GAMBLE,
A. B. HOWLAND,
Attorneys for Petitioner.

APPENDIX.

The following are the statutes of Iowa so far as material to this appeal, involving the procedure as to the assessment and collection of taxes.

Section 1310, 1913 Supplement.

MONEYS — CREDITS — ANNUITIES — BANK NOTES — STOCK.—Moneys, credits and corporation shares or stocks, except as otherwise provided, cash, circulating notes of national banking associations, and United States legal tender notes, and other notes, and certificates of the United States payable on demand, and circulating or intended to circulate as currency, notes, including those secured by mortgage, accounts, contracts for cash or labor, bills of exchange, judgments, choses in action, liens of any kind, securities, debentures, bonds other than those of the United States, annuities, and corporation shares or stocks not otherwise taxed in kind, shall be assessed, and, excepting shares of stock of national, state and savings banks and loan and trust companies, and moneyed capital as hereinafter defined, shall be taxed upon the uniform basis throughout the state of five mills on the dollar of actual valuation, same to be assessed and collected where the owner resides. The millage tax here provided for shall be in lieu of all other taxes upon moneys and credits and shall be levied by the board of supervisors, placed upon the tax list and collected by the county treasurer, and the amount collected in the various taxing districts of the state shall be divided between the various funds upon the same *pro rata* basis as other taxes collected in such taxing district are apportioned. All moneyed capital within the

meaning of section fifty-two hundred nineteen of the revised statutes of the United States shall be listed and assessed against the owner thereof at his place of business, and if a corporation at its principal place of business, at the same rate as state, savings, national bank and loan and trust company stock is taxed, in the same taxing district, and at the actual value of the moneyed capital so invested. The person or corporation using moneyed capital in competition with bank capital shall furnish the assessor upon demand a full and complete itemized sworn statement showing the amount of moneyed capital so used.

Section 1322, 1913 Supplement.

NATIONAL, STATE AND SAVINGS BANKS—REFUSAL TO COMPLY WITH STATUTE—PENALTY.—Section thirteen hundred twenty-two of the supplement to the code, 1907, is hereby repealed and the following enacted in lieu thereof:

"Shares of stock of national banks and state and savings banks, and loan and trust companies, located in this state, shall be assessed to the individual stockholders at the place where the bank or loan and trust company is located. At the time the assessment is made the officers of national banks and state and savings banks and loan and trust companies shall furnish the assessor with lists of all the stockholders and the number of shares owned by each, and the assessor shall list to each stockholder under the head of corporation stock the total value of such shares. To aid the assessor in fixing the value of such shares, the said corporation shall furnish him a verified statement of all the matter provided in section thirteen hundred twenty-one of the supplement to the code, 1907, which shall also show separately the amount of the capital

stock and the surplus and undivided earnings, and the assessor from such statement shall fix the value of such stock based upon the capital, surplus, and undivided earnings. In arriving at the total value of the shares of stock of such corporations, the amount of their capital actually invested in real estate owned by them and in the shares of stock of corporations owning only the real estate (inclusive of leasehold interests, if any,) on or in which the bank or trust company is located, shall be deducted from the real value of such shares, and such real estate shall be assessed as other real estate, and the property of such corporation shall not be otherwise assessed. A refusal to furnish the assessor with the list of stockholders and the information required under this section shall be deemed a misdemeanor and any bank or officer thereof so refusing shall be punished by a fine not exceeding five hundred dollars."

Section 1322-1a, 1913 Supplement.

BANK STOCKS—MONEYED CAPITAL—TAXABLE VALUE. —For the purpose of placing the taxation of bank and loan and trust company stock and moneyed capital as nearly as possible upon a taxable value relatively equal to the taxable value at which other property is now actually assessed throughout the state as compared with the actual value thereof, it is hereby provided that state, savings and national bank stock and loan and trust company stock and moneyed capital shall be assessed and taxed upon the taxable value of twenty per cent of the actual value thereof, determined as herein provided, which twenty per cent of the actual value shall be taken and considered as the taxable value and shall be taxed as other property in such taxing district.

Section 1383, 1913 Supplement.

TAX LIST.—All taxes, except road taxes, which are uniform throughout any township or school district shall be formed into a single tax, and entered upon the tax list in a single column, to be known as a consolidated tax, and each receipt shall show the percentage levied for each separate fund. Before the first day of January in each year, the county auditor shall transcribe the assessments of the several townships, towns or cities into a book, to be provided at the expense of the county for that purpose, to be known as the tax list, properly ruled and headed, with distinct columns, in which shall be entered the names of taxpayers, descriptions of lands, number of acres and value, number of town lots and value, value of personal property and each description of tax, with a column for polls and one for payments, and shall complete the same by carrying out the totals and footings of columns. At the end of the list of each township, town or city he shall make an abstract thereof, and apportion the consolidated tax among the respective funds to which it belongs, according to the number of mills levied for each.

Section 1385-b, 1913 Supplement.

ERRORS CORRECTED—OMITTED PROPERTY.—The auditor may correct any error in the assessment or tax list, and may assess and list for taxation any omitted property; but before assessing and listing for taxation any omitted property he shall notify by registered letter the person, firm, corporation, or administrator, or other person in whose name the property is taxed, to appear before him at his office within ten days from the time of said notice and show cause, if any there be, why such correction or assessment should not be made, and should such party feel ag-

grieved at the action of said auditor he shall have the right of appeal therefrom to the district court. And if such correction or assessment is made after the books have passed into the hands of the treasurer he shall be charged or credited therefor as the case may be. All expense incurred in the making of said correction or assessment shall be borne *pro rata* by the funds which are affected by said correction and the proceedings to be reported to the board of supervisors.

Code of Iowa, 1897, Sec. 1387.

TAX LIST DELIVERED.—He (County Auditor) shall make an entry upon the tax list showing what it is, for what county and year, and deliver it to the county treasurer on or before the thirty-first day of December, taking his receipt therefor; and such list shall be a sufficient authority for the treasurer to collect the taxes therein levied. But no informality therein, and no delay in delivering the same after the time above specified, shall affect the validity of any taxes, sales, or other proceedings for the collection of such taxes.

Code of Iowa, 1897, Sec. 1390.

TREASURER TO COLLECT.—The treasurer, after making the entry, shall proceed to collect the taxes, and the list shall be his authority and justification against any illegality in the proceedings prior to receiving the list; and he is also authorized and required to collect, as far as practicable, the taxes remaining unpaid on the tax books of previous years.

Code of Iowa, 1897, Sec. 1396.

INFORMATION AS TO TAXES DUE.—The treasurer, when applied to by letter and receiving thirty cents in pos-

age stamps or money, and ten cents additional for each tract of one hundred and sixty acres in excess of three hundred and twenty acres, in no case to exceed fifty cents, shall correctly answer the same by mail, giving the amount and interest of unpaid taxes and of any tax sales thereof as the same appear upon the tax list in his office, and upon the return of the letter or a copy, before the last day of the current month, with the demand due as shown therein, he shall pay the taxes and forward to the sender a tax receipt without further charge.

Code of Iowa, 1897, Sec. 1397.

PENALTY.—Any treasurer who shall neglect for twenty days after the receipt of any such letter, with money or stamps inclosed as aforesaid, to answer the same fully as required in the preceding section, or who shall directly or indirectly receive or be concerned in receiving any greater compensation for the service mentioned than as above provided, shall forfeit to the person aggrieved, for each offense, the sum of fifty dollars, which may be recovered in a civil action.

Code of Iowa, 1897.

SECTION 1417. REFUNDING ERRONEOUS TAX.—The board of supervisors shall direct the treasurer to refund to the taxpayer any tax or portion thereof found to have been erroneously or illegally exacted or paid, with all interest and costs actually paid thereon. In case any real estate subject to taxation shall be sold for the payment of such erroneous tax, interest or costs, the error or irregularity in the tax may be corrected at any time provided in this chapter but such correction shall not affect the validity of the sale or the right or title conveyed by a treasurer's deed, if

the property was subject to taxation for any of the purposes for which any portion of the taxes for which the land was sold was levied, and the taxes were not paid before the sale, or the property redeemed from sale.

(Laws of the Thirty-seventh General Assembly.)

CHAPTER 343.

TAXATION.

SECTION 1. Rate of taxation—adjusted taxable value. That hereafter in all taxing districts in the state, including townships, school districts, cities, towns and counties, when by law then existing the people are authorized to determine by vote, or officers are authorized to estimate or determine, a rate of taxation required for any public purpose, such rate shall in all cases be estimated and based upon the adjusted taxable valuation of such taxing district for the preceding calendar year.

SECTION 2. Amounts certified in dollars, not by rate. That when any authorized tax rate within any taxing district of the state, including townships, school districts, cities, towns and counties, shall have been thus determined as provided by law, the officer or officers charged with the duty of certifying said authorized rate to the county auditor or board of supervisors, shall, before certifying the same, compute upon the adjusted taxable valuation of such taxing district for the preceding calendar year (not including moneys and credits and other moneyed capital taxed at a flat rate, as provided in section thirteen hundred ten (1310) supplement to the code, 1913), the amount of tax said rate will raise, stated in dollars, and shall certify said computed amount in dollars, and not by rate, to the county auditor and board of supervisors.

SECTION 3. Computation of rate. When the valuations for the several taxing districts shall have been adjusted by the several boards, as provided by law, for the current year, the county auditor shall thereupon compute and spread upon the records such a rate, not exceeding the rate authorized by law, on said adjusted taxable valuations for the current year (not including moneys and credits and other moneyed capital, taxed at a flat rate, as provided in section thirteen hundred ten (1310), supplement to the code, (1913) as shall raise the amount required for each taxing district within the county, as theretofore determined under the provisions of this act, and no larger amount; provided, however, that if in adjusting the rate to be levied in any taxing district to conform to this act, such rate shall make necessary the levying of a fraction of a mill in excess of one-half of one-tenth of a mill, said fractional excess may be computed as one-tenth of a mill, which latter shall be the smallest required to be spread upon the tax lists for any purpose except rates applicable to state purpose, provided, however, that nothing herein shall be construed as interfering with the right of any taxing district to receive its due proportion of the taxes on moneys and credits and other moneyed capital taxed at a flat rate as provided in section thirteen hundred ten (1310), supplement to the code, 1913.

SECTION 4. Record of rates. On the determination by the auditor of the necessary rates as herein directed, it is made his duty to enter a record of such rates for each taxing district upon the permanent records of his office in a book to be kept for that purpose.

FILE COPY

FILED
JUN 22 19

Supreme Court of the United States

OCTOBER TERM, 1931.

~~1930 Term No. 712~~

1931 Term No. 16

CENTRAL STATE BANK, *Petitioner*,

vs.

E. R. BENNETT, Chairman of the Board of Supervisors of Polk County, Iowa, et al., *Respondents*.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA.

BRIEF OF PETITIONER.

J. G. GAMBLE,
A. B. HOWLAND,
500 Bankers Trust Bldg.,
Des Moines, Iowa,
Counsel for Petitioner.

INDEX.

Appendix 86
Argument 38
Specification of Errors 28
Statement of the Case 4
The Issues 4
Taxation of Bank Capital 8
Existence and Taxation of Moneyed Capital 11
Banking Business of Petitioner 22
Prior Adjudication in Munn v. Des Moines Nat'l Bank 24
Iowa Supreme Court Decision 26
Summary of Argument 31

I. Under the laws of Iowa the petitioner is entitled to have its shares taxed at the lawful rate imposed on the shares of national banks. The record discloses that large and material amounts of moneyed capital were deliberately and intentionally taxed at but five mills on the dollar and the State could not exact a greater rate upon the shares of national banks. The taxes upon the shares of petitioner in excess of five mills were therefore unlawful and void 31-32

II. The record discloses that the Laws of Iowa were deliberately, systematically and habitually administered by the officers of the State and its subdivisions so as to produce a discrimination against the shares of petitioner and in favor of other moneyed capital prohibited by the terms of Sec. 5219 of the Revised Statutes of the U. S. and in violation of the restrictions imposed by the 14th Amendment 33

III. The determination by the Iowa Supreme Court that the acts of the county auditor were not binding on the State is clearly untenable 34

IV. There is neither pleading nor proof that the taxing officers of the State have undertaken or can now collect taxes upon moneyed capital so as to remove the discrimination 34

V. The evidence discloses that the taxes involved were exacted of petitioner by compulsion and under duress. The petitioner has a federal right to have such illegal taxes refunded to it and this federal right was denied by the decision of the Iowa Supreme Court 35

VI. By the prior decisions of the Iowa Supreme Court the Board of Review was without jurisdiction to assess the shares of petitioner as "moneys and credits". Resort to the Board of Review would therefore have been futile and the laws of Iowa deny petitioner the equal protection of the law and due process of law in violation of the 14th Amendment 35

VII. The decision in the case of Munn v. Des Moines Nat'l Bank 18 Fed. (2) 269 by the Circuit Court of Appeals for the 8th Circuit was binding upon the courts of Iowa and required that the shares of petitioner be accorded taxation at the same rates as the shares of the banks involved in the Munn case 36

VII-A. The identical cause of action involved in this case was determined by the Circuit Court of Appeals for the 8th Circuit in Munn v. Des Moines Nat'l Bank and the adjudication in the Munn case is binding upon the respondents 37

INDEX TO CASES CITED.

Amoskeag Savings Bank v. Purdy, 231 U. S. 373 32
Avoca State Bank v. Burke, Co. Auditor, 193 Iowa 1055 65
Boyer v. Boyer, 113 U. S. 689 32-33
Cannon v. Nelson, 83 Iowa 242 82
Carpenter v. Shaw, 280 U. S. 363 35-62-78

Central of Georgia R. R. Co. v. Wright, 207 U. S. 127 36
C. & N. W. R. Co. v. Osborne, 265 U. S. 14 34-47
Cummings v. Merchants Nat'l Bank, 101 U. S. 153 33-47-51
Des Moines Nat'l Bank v. Des Moines, 153 Iowa 336 37
Des Moines Nat'l Bank v. Fairweather, et al., 191 Iowa 1240; 263 U. S. 103 10-61-81
Eddy, Co. Treas. v. First Nat'l Bank of Fargo, 275 Fed. 550 (C. C. A. 8th Cir.) 33
Evansville Nat'l Bank v. Britton, 105 U. S. 322 32-34
First Nat'l Bank v. Chapman, 173 U. S. 205 32
First Nat'l Bank v. City of Council Bluffs, 182 Iowa 107 71
First Nat'l Bank of Council Bluffs v. Burke, Co. Aud., 196 N. W. 287 66
First Nat'l Bank of Estherville v. City Council, 150 Iowa 95 37-83
First Nat'l Bank of Guthrie Center v. Anderson, 269 U. S. 341 32-39-41
First Nat'l Bank of Hartford v. City of Hartford, 273 U. S. 548 32-42
First Nat'l Bank of Remsen v. Hayes, Co. Auditor, 186 Iowa 892 65
Fort Madison Security Co. v. Maxwell, 202 Iowa 1346 56
Greene v. L. & I. Ry. Co., 244 U. S. 499 33-47-51
Home Savings Bank v. Des Moines, 205 U. S. 503 60-83
Illinois Central R. Co. v. Greene, 244 U. S. 555 33
Iowa Central Ry. Co. v. Bd. of Review, 176 Iowa 131 34
L. & N. Rd. Co. v. Greene, 244 U. S. 522 32
Mercantile Nat'l Bank v. New York, 121 U. S. 138 32-41
Merchants & Mfgs. Nat'l Bank v. Penn., 167 U. S. 461 32
Merchants Nat'l Bank of Richmond v. Richmond, 256 U. S. 635 32-34
Minnesota v. First Nat'l Bank of St. Paul, 273 U. S. 561 32
Montana Nat'l Bank v. Yellowstone Co., 276 U. S. 499 35-59-60-67
Munn v. Des Moines Nat'l Bank, 18 Fed. (2) 269, (C. C. A. 8th Cir.) 24-25-30-31-32-33-34-35-36-37-38-72-78-80-82
Munn v. Bankers Trust So., 18 Fed. (2) 269 30
Northwestern Bank of Ireton v. Van Roekel, 202 Iowa 237 56
Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287 36
People, ex rel. v. Goldfogle, 137 N. E. 611 32
People, ex rel. v. Weaver, 100 U. S. 539 33
Raymond v. Chicago Union Traction Co., 207 U. S. 20 33-36-47
Reagan v. Farmers Loan & Trust Co., 154 U. S. 362 33-34-50
Security Savings Bank v. Board of Review, 189 Iowa 463 31-32-39
Sioux City Bridge Co. v. Dakota County, 260 U. S. 441 33-34-36-47-75
Sunday Lake Iron Co. v. Wakefield, 247 U. S. 350 32-47-51
Supervisors Albany County v. Stanley, 121 U. S. 535 33
State Bank v. Endres, 192 N. W. 322 (Neb.) 32
Steele v. Madison County, 198 Iowa 902 63
Taylor v. L. & N. R. R. Co., 88 Fed. 350 77
Turner v. Wade, 254 U. S. 64 36
Ward v. Love County, 253 U. S. 17 35-62-78
Whitbeck v. Mercantile Nat'l Bank, 127 U. S. 193 33

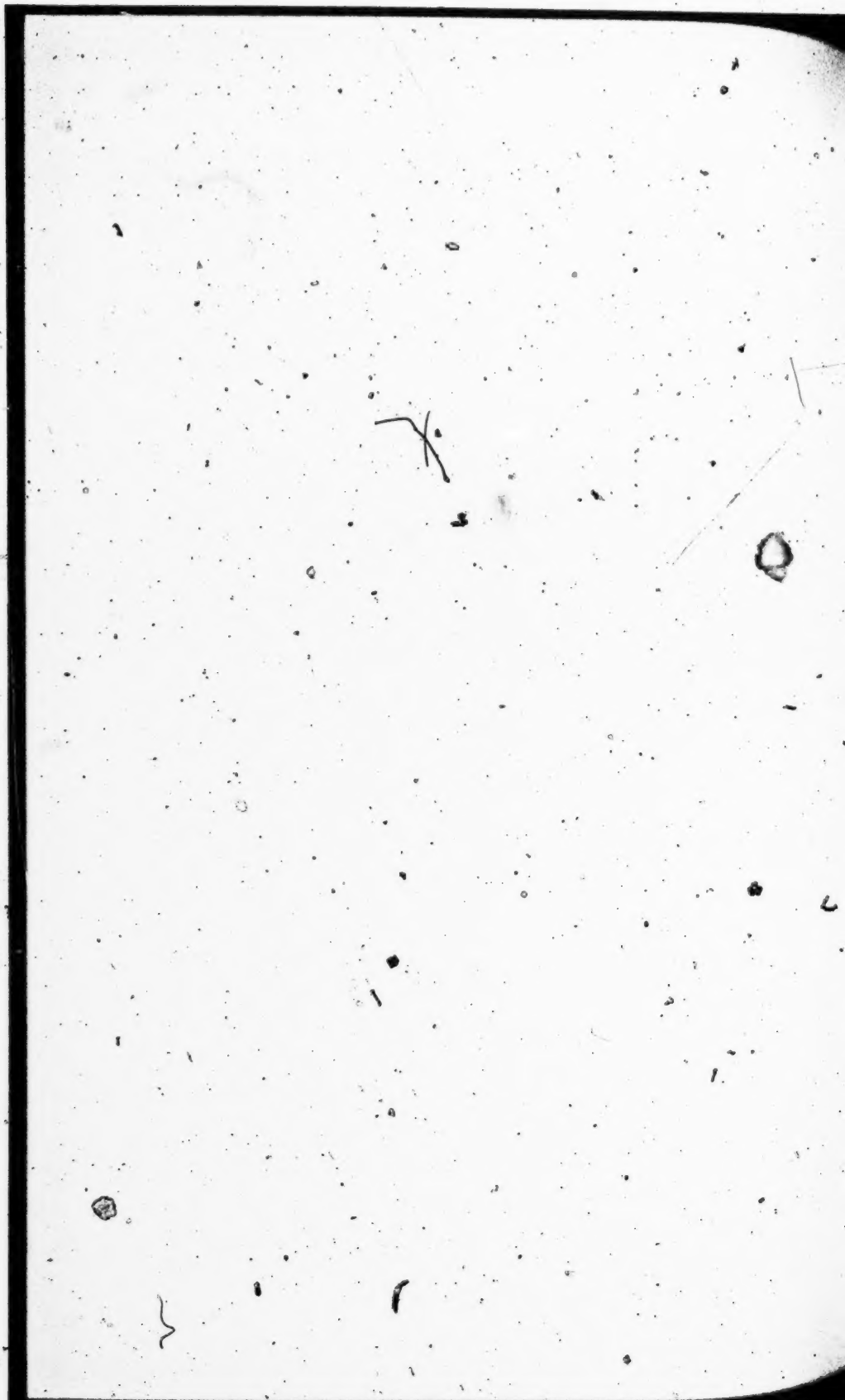
STATUTES CITED.

Chapter 343 Laws 37th G. A. ..... 34-35—App. 93
Code of 1897, Section 1322 8
Code of 1897, Section 1385 34
Code of 1897, Section 1387 ..... 34-35—App. 91
Code of 1897, Section 1390 ..... 55—App. 91
Code of 1897, Section 1396 ..... 55—App. 91
Code of 1897, Section 1397 ..... 55—App. 92
Code of 1897, Section 1417 ..... 4—App. 92
Code Supplement of 1913, Section 1072 34-54
Code Supplement of 1913, Section 1311 26
Code Supplement of 1913, Section 1310 ..... 4-5-26-31-38-46-47—App. 86

Code Supplement of 1913, Section 1322 ..... 4-31-38-46-47—App. 87
Code Supplement of 1913, Section 1322-1a ..... 4-8-31-38-46-47—App. 87
Code Supplement of 1913, Section 1373 ..... 69-73-74—App. 88
Code Supplement of 1913, Section 1383 ..... 34-54—App. 90
Code Supplement of 1913, Section 1385-b ..... 34-55—App. 90
Code of 1927, Section 7135 69
Code of 1927, Section 7235 ..... 4-67—App. 92
Judicial Code, Section 128 37
Fourteenth Amendment to the Constitution of the U. S. .....
..... 5-28-29-31-32-33-35-36-47-50-51-52-57-58-59-61-62 75-58-85
Section 5219 of the Revised Statutes of the U. S. .....
..... 5-6-13-28-29-31-32-38-39-41-45-46-47-51-57-58-59-68 79-82

INDEX TO APPENDIX.

Section 1310, Code Supplement 1913 86
Section 1322, Code Supplement 1913 87
Section 1322-1a, Code Supplement 1913 87
Section 1373, Code Supplement 1913 88
Section 1383, Code Supplement 1913 90
Section 1385-b, Code Supplement 1913 90
Code of Iowa, 1897, Section 1387 91
Section 1390, Code of 1897 91
Section 1396, Code of 1897 91
Section 1397, Code of 1897 92
Section 1417, Code of 1897 (Code of 1927, Sec. 7235) 92
Laws of 37th General Assembly, Chapter 343 93



Supreme Court of the United States

OCTOBER TERM, 1931.

1930 Term No. 712
1931 Term No. 16

CENTRAL STATE BANK, *Petitioner*,

vs.

E. R. BENNETT, Chairman of the Board of Supervisors of Polk County, Iowa, et al., *Respondents*.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA.

BRIEF OF PETITIONER.

THE OPINION OF THE COURT BELOW

The opinion of the Supreme Court of Iowa was by a divided court and was rendered on September 26, 1930, and the majority opinion appears in the printed record at page 1340; the dissenting opinion at page 1358. The case has not been officially reported, but appears in 232 Northwestern Reporter, 445.

On December 8, 1930, application was made to Justice Butler of this Court for an order extending the time for filing petition for Writ of Certiorari, and on the same day an order was entered extending such time for 60 days from that date. The petition was duly filed within the time thus allowed and the Writ was granted on March 16th, 1931.

STATEMENT OF THE CASE.

THE ISSUES.

The petitioner, a state bank organized and existing under the laws of the State of Iowa, relating to banking institutions, was at all times herein referred to, engaged in the business of banking in the City of Des Moines, Polk County, Iowa. It brought this action in mandamus in the District Court of Polk County, Iowa, seeking a writ directing the respondents, in their respective capacities as members of the Board of Supervisors and County Auditor and County Treasurer of said county (proper substitution of successors in office during the pendency of the action, having been made), to refund to the petitioner certain taxes and penalties thereon erroneously and illegally exacted of the petitioner by said respondents and by the taxing officers of the county in the years 1919 to 1922, inclusive. The proceeding is one authorized by the Statutes of Iowa in force at the time the cause of action accrued (Code 1897, Section 1417) now included in the Code of 1927 as Section 7235.

During the four years involved the statutes of Iowa provided that the shares of national banks, state banks, loan and trust companies and "all moneyed capital within the meaning of section fifty two hundred nineteen of the revised statutes of the United States" should be taxed at the combined millage rate for State, County, City and school purposes, applied to twenty per cent of the actual assessed value thereof. See Sec. 1310-1322 and 1322-1a Code Supplement 1913, Appendix. The combined millage rate was commonly referred to as the "consolidated levy." The Iowa statutes also required that moneys and credits, annuities, cash, U. S. legal tender currency, notes, including those secured by mortgages, bonds, debentures, accounts, contracts, bills of exchange, judgments, liens and choses in action be taxed at the

uniform rate of five mills on the dollar, applied to the actual assessed value. See Sec. 1310 Code Supp. 1913. Appendix.

The basis of the action was:

First. That during the four years in question the taxing officials of the City of Des Moines and County of Polk subjected the shares of the petitioner to taxation at the consolidated levy rate applied to twenty per cent of the assessed value; but at the same time deliberately, systematically and intentionally subjected all competing moneyed capital, as defined by Sec. 5219, to taxation at but five mills on the dollar, and thereby subjected the shares of stock of petitioner to taxation in said years at rates from five to seven times the rate imposed upon "such other moneyed capital." That the deliberate, intentional, systematic and habitual discrimination thus practiced against the shares of petitioner constituted a violation of the restriction contained in Section One of the Fourteenth Amendment to the Constitution of the United States, and the action of the state, through its duly constituted taxing officers constituted not only a violation of the laws and constitution of Iowa but as well a violation of the equal protection clause of the Fourteenth Amendment to the Federal Constitution.

Second. That the action of the taxing officers of Polk County and of the City of Des Moines was systematic, habitual, and was deliberately followed during all of said years as part of a plan for the administration of the taxing laws of Iowa and as such constituted a clear, deliberate and intentional discrimination between taxpayers placed within the same class. That by the action of the taxing officers charged with the administration of the tax laws in said City and County the petitioner was denied the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States.

That the county treasurer of Polk County, Iowa, the collecting agent of taxes for the State of Iowa and all of its po-

litical subdivisions, demanded of the petitioner that it pay taxes upon its shares at the said consolidated levy rate, together with interest and penalties thereon, and threatened to enforce collection of said taxes, interest, and penalties by seizure and sale of plaintiff's property; that in order to prevent the sale of its property and the accumulation of penalties, the petitioner, on November 30, 1923, under written protest, paid to the said treasurer the following amounts, to-wit:

Year.	For taxes.	For penalties.
1919	$ 8,745.48	$ 3,945.37
1920	10,286.68	3,908.34
1921	12,292.62	3,196.08
1922	14,343.65	1,147.49

Third, that in a suit instituted in the United States District Court for the Southern District of Iowa by the Des Moines National Bank, a corporation organized under the national banking laws of the United States, against the county treasurer of Polk County, Iowa, a judgment and decree was rendered enjoining the collection of taxes against the shares of stock of said Des Moines National Bank at a greater rate than five mills on the dollar of actual valuation for the years 1919 to 1922, inclusive, on account of the unconstitutional administration of the statutes of the State of Iowa by the taxing officers of the City of Des Moines and of Polk County, Iowa, and because of the violation of the restrictions upon the power to tax the shares of stock of the said Des Moines National Bank, contained in Section 5219 of the Revised Statutes of the United States. That the said county treasurer appealed from said judgment and decree. That the Board of Supervisors and the State of Iowa, by the Attorney General, and the City of Des Moines, by its corporation counsel, all appeared in said cause upon its trial in the district court, and in the appeal therefrom to the Circuit Court of Appeals of the United States for the Eighth Circuit, and participated in the presentation of the defense to said action, and bore a part of the expense of such defense. That the judgment and

decree of said District Court of the United States was affirmed by the Circuit Court of Appeals, and no review thereof was sought in this Court, so that said judgment became final. That under and pursuant to said judgment, and because of the unconstitutional and unlawful acts of the taxing officials of the same taxing district, for the same years involved in this cause as determined in said action, the shares of stock of said Des Moines National Bank were subjected to taxation at only five mills on the dollar. It was alleged that such adjudication was binding upon the respondents.

Respondents, by way of answer in said action, admitted that levies were made upon the shares of petitioner substantially as alleged, but pleaded other defenses which may be summarized as follows:

1. A denial of facts not admitted.

2. That the money paid by the petitioner in each of the years in controversy had been distributed to the various political subdivisions entitled thereto, and respondents had no money with which to make refund to petitioner if the court were to so decree.

3. The statute of limitations.

4. Laches.

5. That petitioner had a plain, speedy, and adequate remedy at law.

6. That the remedy of petitioner, if any, is by appeal from the action of the board of review.

7. The petitioner is not entitled to maintain an action in mandamus.

8. That petitioner may not recover because of a violation of the taxing statutes of Iowa by the taxing officers.

9. That the petitioner does not come into court with clean hands, in that during the years in controversy the plaintiff, through its officers and agents, assisted and aided other taxpayers in evading taxation in Polk County, Iowa, and elsewhere.

10. That petitioner may not maintain an action to procure refunds of taxes upon its shares of stock, even though paid by it, because it is not the proper party to maintain such action.

11. That the district court was without jurisdiction to grant the relief prayed, for it affirmatively appeared, that, after the institution of the action, the Board of Supervisors had denied the claim, and that such action constituted a judicial determination and finding, which cannot be collaterally attacked in a mandamus action, and that petitioner's remedy, if any, was by certiorari and not by mandamus.

12. That there was no adjudication in the action in the United States Courts, except an adjudication that the county treasurer should be enjoined from collecting certain taxes upon the shares of the Des Moines National Bank, and that the same was in no way binding upon the respondents.

Upon the trial evidence in great detail was adduced, from which the following may be discerned.

The Taxation of Bank Capital.

In January of each year petitioner made to the city assessor of the City of Des Moines, a statement as required by Section 1322, Code of 1897 and 1322-1a Code Supplement 1913. A typical statement is reproduced at record 1021. This statement disclosed the amount of the capital, surplus and undivided earnings of petitioner, and the book value of its real estate. In each year the city assessor made one assessment in a lump sum to the stockholders of petitioner for all its shares and entered the same under the head "corporation stock" on form No. 1 of the assessment rolls. The form used in making such assessments is shown by Exhibit No. 1449 reproduced at Record 1023. The City Council of each city is by statute constituted a local Board of Review

to adjust the assessments and supervise the work of the assessor. The City Council of Des Moines sitting as a Board of Review adjourned *sine die* on April 30, 1919 for that year; on May 1, 1920 for that year; on April 30, 1921 for that year; and on May 6, 1922 for that year. See Record 581-582.

After the Board of Review had met and adjourned, the assessments upon petitioner's shares were copied into books designated as Assessor's District Books as "corporation stock" and certified by the city assessor to the County Auditor in that form. A typical page of the assessor's district books is reproduced at Record 1025. The duty of compiling the tax list was by statute delegated to the county auditor. The county auditor pursuant to statute applied the consolidated tax for state, city, county and school purposes to twenty per cents of the assessed value of the shares of petitioner, and certified the tax list to the county treasurer for collection on December 31st of each year. The tax list was not made up and completed until after the millage rates for state, county, city and school purposes was known. The millage for state purposes was fixed by resolution of the State Executive Council in August of each year. (R. 588-589.) The millage for county purposes was fixed by the Board of Supervisors in September of each year. (R. 588-589.) The amount of revenue necessary to be raised for school purposes was fixed by the Board of Directors of the Independent School District in dollars, in July of each year and certified in that form to the county auditor, whose duty it was to compute the millage rate necessary to raise the amount so certified. (R. 588-589.) The amount necessary for municipal purposes was similarly fixed by the City Council of the City of Des Moines in August or September of each year. (R. 588-589.)

The consolidated tax applied to twenty per cent (20%) of the assessed value of petitioner's shares during the four years was as follows:

1919 — 137.8 mills
1920 — 157 "
1921 — 164 "
1922 — 160.4 "

The amount of banking capital represented by shares of stock in national banks and state banks and trust companies which was subjected to taxation in the City of Des Moines during each of the four years was as follows:

	1919	1920	1921	1922
National Banks	$3,099,205	$3,276,168	$3,587,657	$3,485,535
State Banks and Trust Companies	4,519,134	4,634,356	6,320,367	6,086,481

(See Record 750.)

Between 1919 and 1923 litigation was pending involving the right of state and national banks to deduct from the assessed value of their shares of stock, the par value of tax-exempt United States bonds and securities owned by the bank. This litigation was ultimately determined adversely to the banks. See *Des Moines National Bank v. Fairweather, et al.*, 191 Iowa 1240; 263 U. S. 103.

On November 28, 1923, petitioner tendered to the county treasurer the amount of the taxes upon the assessed value of its shares for the years in question at the five mill rate, with interest. This tender was refused and demand made for the full consolidated millage levy with statutory penalties and interest which then amounted to approximately $12,000.00. On November 30th, petitioner pursuant to such demand of the delinquent tax collector, paid taxes and penalties as hereinbefore set forth under protest; protest being endorsed on the face of the tax receipt issued by the county treasurer. (R. 1001-1002.)

Petitioner filed with the county auditor its claim for refund of the taxes and penalties so paid, on September 14, 1925, and the board of supervisors on July 15, 1927, but after the institution of this action, denied said claim for refund (R. 557). The county treasurer, after the filing of the petitioner's claim, remitted funds to the Treasurer of State, to the City Treasurer of Des Moines, to the Treasurer of the Independent School District, and also retained funds for county purposes in the following amounts:

Year	To Treasurer of State.	City Treasurer.	School Treasurer.	County.
1926	$502,103.00	$2,724,250	$2,972,351	$1,333,597
1927 (11 mo.)	488,715.00	2,743,833	2,880,859	1,171,223

(R. 700.)

And the amount of money to be collected in Des Moines in 1928, as shown by the tax lists at the time of the trial was:

State	$ 424,295
County	1,197,457
City	2,737,872
School	3,038,901
Soldiers' Bonus (State)	32,003
Moneys and Credits	160,010

(R. 701, 824.)

The Existence and Taxation of Moneyed Capital.

The testimony with respect to the quantity, ownership, and use of moneyed capital was necessarily voluminous. The petitioner called approximately two hundred witnesses to testify with respect to the business carried on by numerous corporations, copartnerships and individuals engaged in various phases of the loan and investment business in the City of Des Moines. The evidence may be more readily understood if treated by classes. We shall therefore consider the evidence in the following classes:

A—"moneyed capital" consisting of shares of stock of domestic corporations engaged in the loan and investment business, which were assessed by the assessor and board of review as "corporation stock", on form No. 1 of the assessment roll, and certified to the auditor in that form but which were placed on the tax list as "moneys and credits" and subjected to a tax of but five (5) mills on the dollar.

B—"moneyed capital" employed by non-resident corporations, copartnerships and individuals engaged in loaning money on automobiles, cattle, and chattel security, and in discounting notes and commercial paper, assessed as "moneys and credits" and taxed at five (5) mills on the dollar.

C—"moneyed capital" employed by individuals in making loans for investment, and in notes, bonds and securities, assessed as "moneys and credits" and taxed at five (5) mills on the dollar.

"A".

During the four years in question, the shares of twenty-seven corporations, organized under the laws of Iowa and engaged in various phases of the loan business in the City of Des Moines, were assessed by the city assessor as "corporation stock" on form No. 1 of the assessment roll. Typical of such assessments is the 1919 assessment roll upon the shares of the Security Loan & Investment Company reproduced at R. 1015. The assessments upon the shares of these corporations were confirmed by the Board of Review in each of the years as "corporation stock", and were certified to the County Auditor in that form.

The County Auditor in making up the tax lists placed the assessments upon the shares of these corporations in the column "moneys and credits" and intentionally and uniformly applied thereto a tax at the rate of but five mills on the dollar. For convenience we have tabulated the assessments

upon the shares of such corporations as shown by the evidence, showing the name of each corporation, together with the value of the shares assessed as "corporation stock" in each year which were taxed at five mills on the dollar:

Name of corporation	1919	1920	1921	1922
Security L. & Inv. Co.	$84,619	$64,010	$109,980	$133,904
Central Ia. Jt. St. L. Bk.		243,690	217,269	253,619
Iowa Inv. & Mtg. Co.	30,705	42,305	47,560	52,600
Des Moines Morris Plan Co.	96,433	102,044	100,302	100,000
Continental Sec. Co.	46,384	42,837	73,641	90,083
Garner Inv. Co.		51,495	56,690	20,000
Jesse F. Stevenson Co.	33,632	34,069	31,100	30,500
Farmers Bond & Mtg. Co.			152,489	120,366
Union Mtg. & Cat. L. Co.		214,399	1,044,797	950,435
Bond & Mtg. Co. of Ia.	36,770	290,163	233,580	247,593
Manning-Martin Co.	4,212	16,045	30,170	21,550
D. M. Jt. Stk. Ld. Bk.		247,124	217,700	214,106
1st & 2nd Mtg. Corp.	771,376	864,305	520,530	486,773
Com. Bldg. & Sec. Co.			57,321	104,305
Cont. Mtg. & Loan Co.			31,051	
D. M. Discount Co.			4,276	7,333
Bankers Mtg. Co.	602,270	1,486,815	933,290	897,996
Liberty Investment Co.			770,582	771,612
United Mtg. & Loan Co.	10,762	11,175	11,798	11,526
Merchants L. & Inv. Co.			31,450	59,474
Nat. Inv. & Fin. Co.		138,000	506,770	
Burns Bros. Co.				348,900
State Bond Co.				11,413
Polk County Mtg. Co.	32,910	25,145	28,607	9,317
Corn Belt Land & Loan Co.	4,114			
Guaranty Mtg. & Fin. Corp.	68,235	610,922	945,530	936,574
United Cattle L. & L. S. Co.		500,000	696,547	805,547
Total Assessments	$1,822,452	$4,984,543	$6,813,030	$6,685,526

Since it is conceded by the majority opinion of the Iowa Supreme Court that the shares of these corporations constituted a relatively material amount of moneyed capital within the meaning of Section 5219 of the Revised Statutes of the United States, we shall not burden this Court with a detailed recital of the evidence as to the business carried on

by each of the competing corporations but will briefly refer to the record pages where the evidence with respect thereto may be found.

Two of these corporations, the shares of which were originally assessed as "corporation stock", but which were subsequently placed on the tax list and taxed at the five-mill rate, were Joint Stock Land Banks, organized under the Act of Congress, engaged in making loans on farm lands within the State of Iowa.

Central Iowa Joint Stock Land Bank. (R. 220, 222, 224.)

Des Moines Joint Stock Land Bank. (R. 312-316.)

Fifteen of such corporations made, sold and discounted loans secured by first mortgage liens on Iowa real estate, both farm lands and city property.

Security Loan & Investment Co. (R. 197-203.)
Iowa Investment & Mortgage Company. (R. 218.)
Continental Securities Company. (R. 257.)
Jesse F. Stevenson Company. (R. 285.)
Farmers Bond & Mortgage Company. (R. 292.)
Union Mortgage & Cattle Loan Company. (R. 300.)
Bond & Mortgage Company of Iowa. (R. 302.)
Manning Martin Company. (R. 307.)
First & Second Mortgage Corporation. (R. 313.)
Commercial Building & Securities Company. (R. 327.)
Bankers Mortgage Company. (R. 343.)
United Mortgage & Loan Company. (R. 349.)
Merchants Loan & Investment Company. (R. 350.)
National Investment & Finance Company. (R. 745.)
Guaranty Mortgage & Finance Corporation. (R. 617, 619.)

Three of these corporations financed public improvement contractors, engaged in constructing municipal improvements in cities and towns in Iowa. The corporations advanced funds to contractors to enable them to complete their contracts and received in payment of such advances, at a discount, improvement securities issued by the municipalities. The securities were then sold to investors.

Security Loan & Investment Company. (R. 198-203.)

Continental Securities Company. (R. 258-259.)

Jesse F. Stevenson Company. (R. 286.)

Four of the corporations financed dealers in automobiles by the purchase of notes or acceptances secured by liens on motor vehicles in the possession of the dealer, or in the hands of purchasers.

Bond & Mortgage Company of Iowa. (R. 303.)

Des Moines Morris Plan Company. (R. 249.)

Continental Mortgage & Loan Company. (R. 337.)

Des Moines Discount Company. (R. 341.)

Three of the corporations made loans secured by liens on feeder cattle located in Iowa.

United Cattle Loan & Live Stock Company. (R. 742.)

National Investment & Finance Company. (R. 745.)

Union Mortgage & Cattle Loan Company. (R. 300, 319-323.)

Nine of such corporations purchased government, municipal, public utility and industrial bonds, which they resold to individual investors and institutions located in Des Moines and elsewhere:

Security Loan & Investment Company. (R. 198.)

Continental Securities Company. (R. 258.)

Garner Investment Company. (R. 266.)
Jesse F. Stevenson Company. (R. 285, 287.)
Bond & Mortgage Company of Iowa. (R. 302.)
Bankers Mortgage Company. (R. 344.)
Liberty Investment Company. (R. 160.)
Burns Brothers Company. (R. 743.)
Guaranty Mortgage & Finance Corporation. (R. 617-619.

Some of the corporations made collateral loans both for their own account and for other investors (See Jesse F. Stevenson Company, R. 288); others discounted notes and acceptances secured by liens on household appliances and other personal property. (Des Moines Morris Plan Company, R. 249.) The following corporations issued and sold to investors debenture bonds secured by the deposit of mortgages, municipal bonds or other securities in the hands of trustees:

Security Loan & Investment Company. (R. 214.)
Continental Securities Company. (R. 258.)
Farmers Bond & Mortgage Company. (R. 292.)
Commercial Building & Securities Company. (R. 327.)
Bankers Mortgage Company. (R. 345.)
State Bond Company. (R. 366.)
Guaranty Mortgage & Finance Corporation. (R. 617.)

Substantially all phases of the loan and investment business were carried on in the City of Des Moines during the four years in question by these corporations.

"B".

In each of the four years certain foreign corporations, copartnerships and individuals, operating under trade names, were engaged in various phases of the loan business in the City of Des Moines. The capital actually employed by these corporations, copartnerships and individuals was assessed by the city assessor as "moneys and credits" on form No. 2 of the assessment roll and the assessments were approved by the board of review. The assessments were then placed upon the tax list as "moneys and credits" and a tax of five mills on the dollar applied thereto by the county auditor. The moneyed capital of such corporations, copartnerships and individuals as shown by the record, may be tabulated as follows:

Name of Taxpayer	1919	1920	1921	1922
Iowa Guarantee Mtg. Corp.	$54,570	$306,945	$147,423	$142,000
Federal Cattle Loan Society		85,000	861	-
Bankers Loan & Inv. Co.	10,300		55,000	151,570
Motor Finance Co.			8,085	15,300
M. Aliber & Co.	13,790	8,040	17,524	12,117
Loyal Loan Co.	25,000	25,000	25,000	25,000
Capital Loan Co.	2,523		6,553	7,660
State Loan Co.	22,500			
Des Moines Loan Co.	5,780	12,283		7,368
Globe Loan Co.	2,600	3,500	5,000	7,500
Home Loan & Inv. Co.	9,200	12,400	13,400	13,557
Totals	$146,263	453,168	278,846	382,072

Six of these taxpayers were engaged in the "small loan business" which consisted of making loans not exceeding $300.00 secured by chattel mortgages on personal property, principally household furniture and automobiles. Most of these loans were payable in installments.

M. Aliber & Company. (R. 584.)

Loyal Loan Company. (R. 281.)

Capital Loan Company. (R. 653.)
State Loan Company. (R. 655.)
Des Moines Loan Company. (R. 282.)
Globe Loan Company. (R. 694.)

In 1920 the Federal Cattle Loan Society reported to the city assessor notes of $144,241, evidencing loans on feeder cattle, together with money on deposit of $17,570; bills payable of $76,811 were deducted, leaving a net assessment of $85,000. (R. 159, 274.)

The Iowa Guarantee Mortgage Corporation financed dealers in automobiles by the purchase at a discount of sales contracts and trade acceptances secured by liens on automobiles in the hands of dealers or purchasers. In 1919 this Company handled a gross volume of business of $1,013,740.00; in 1920, $1,179,032.00; in 1921, $411,751.00; and in 1922, $606,999.00. (R. 262-63.) This company issued bonds which were sold to banks and individual investors. (R. 262.) The bonds were secured by deposit of the company's collateral with the Des Moines Savings Bank & Trust Company as trustee. The Motor Finance Company was a copartnership engaged in similar business. (R. 298.)

"C".

Large numbers of individual taxpayers residing in the City of Des Moines held notes representing loans, both secured and unsecured. Numerous individuals also held notes and bonds of railroads, public utilities and industrial concerns. Assessments upon securities of this character were uniformly made on form No. 2 of the assessment roll as "moneys and credits". The good faith indebtedness of the taxpayer was deducted from the gross amount and the net assessment subjected to a tax of five (5) mills on the dollar. A large amount of evidence was introduced showing the char-

acter of such loans made or held by individual taxpayers. The net assessments upon securities of this character disclosed by the evidence during each of the years, was as follows:

1919 — $1,422,274.00
1920 — $1,768,048.00
1921 — $1,587,436.00
1922 — $1,783,765.00

The county auditor, or his deputy acting under his authority in making up the tax list in each of the four years deliberately and systematically placed all assessments upon the shares of domestic corporations engaged in the loan business under the head "moneys and credits" and applied thereto a tax at the rate of five (5) mills on the dollar. (R. 582.) The county auditor was called as a witness by petitioner and testified that the assessments upon the shares of the Jesse F. Stevenson Company were certified to him upon the assessor's district book as "corporation stock" and that in each year he deliberately and intentionally placed the same upon the tax list under the column "moneys and credits" and computed the taxes thereon at the five (5) mill rate. (See R. 236, 237, 238.) The auditor further testified:

"The method used in the assessment and the computation of taxes upon the shares of stock in Iowa corporations which were engaged in business in the City of Des Moines during the four years, 1919 to 1922, inclusive, was substantially the same as I have testified to with reference to the Jesse F. Stevenson Company as to the manner of the return upon the assessment roll; the entry of the assessment upon the assessor's book, and the entry of the same upon the tax list.

Q. Now with respect to individuals, in the year 1919 Mr. Rhoads, how were individuals, who had notes, mortgages and other evidences of indebtedness taxed upon the tax list?

A. Taxed on five mills on the dollar.

Q. Now was there in the year 1919 any individual in the taxing district of the City of Des Moines who had an assessment designated as "Moneyed Capital" which was taxed at the consolidated levy?

A. Not to my knowledge.

Q. Now with respect to the year 1919, where corporations were engaged in business in the City of Des Moines, how were the shares of stock of such corporations taxed when they were certified over on the assessor's book as "corporation stock"?

A. They were placed in the column headed "moneys and credits" and taxed at five mills on the dollar.

Q. Were the shares of stock of corporations so assessed placed on the tax list as moneyed capital, and taxed at the consolidated levy rate?

A. Not to my knowledge, no sir.

Q. During the year 1919, were there any assessments against individuals representing money loaned or invested in notes or securities, such as normally enter into the business of banking, which were taxed at more than five mills on the dollar?

A. All money assessed by the assessor in the hands of individuals was taxed at five mills on the dollar.

Q. In the year 1919, were there any notes in the hands of individuals taxed at a higher rate than five mills on the dollar?

A. Not to my knowledge, there were not. (R. 239, 240.)

* * * * *

As far as I know, there was no difference between notes given, evidencing loans of money or investment of funds for the purpose of earning interest, and any other notes. They are not so listed on the tax books and I cannot tell you. There was no distinction in the method of taxation of notes of that general class and character and any other notes." (R. 240.)

* * * * *

"With the exception of banks and trust companies, the taxes upon the assessments of corporation stock were computed on the basis of five mills on the dollar for the year 1919. The taxes were so computed and placed on the tax list by authority of the county auditor. That was true also of the year 1920. There were no assessments upon the shares of stock of any corporation in the City

of Des Moines during the years 1919 and 1920, other than the shares of banks and trust companies which were taxed at a rate in excess of five mills upon the dollar. The same is true of the years 1921, and 1922.

Q. Now with respect particularly to companies that were engaged in the business of making mortgage loans, investment companies and companies that were engaged in the purchase and sale of commercial paper, and similar concerns, what is the fact as to the rate at which the shares of stock of such corporations were taxed during the entire four year period?

A. They were assessed five mills on the dollar.

Q. Do you mean the five mill rate was applied to the assessed value of such shares?

A. It was.

(R. 241-242.)

When the taxes upon the shares of such corporations were put on the tax list at the five mill rate, they were put there during the two years that I was county auditor with the intention that the taxes would be so collected by the county treasurer's office; and so far as I know, that was true of the taxes that were computed and spread on the tax list during the years 1919 and 1920.

(R. 242.)

Q. Was there any moneyed capital whether in the hands of individuals, or in the form of shares of stock of corporations, that was in fact taxed upon the same basis with the shares of stock in banks and trust companies—any form of moneyed capital of any kind that was in fact taxed at the consolidated levy rate?

A. Not to my knowledge, outside of banks.

(R. 247.)

"There were no assessments against individuals in the year 1920 for notes, bonds or other evidences of indebtedness which were taxed at a higher rate than five mills on the dollar. The same is true in the years 1921 and 1922. They were all handled the same in all four years. All assessments against individuals which were returned on form No. 2 on the back of the assessment roll were taxed at the uniform rate of five mills on the dollar of valuation.

It is true that in the years 1920, 1921 and 1922, all individuals having notes, mortgages or other evidences of indebtedness representing money loaned out in any form were taxed at five mills on the dollar. Shares of stock in loan and investment companies in the years 1919, 1920, 1921 and 1922 were all taxed on the basis of five mills on the dollar. Shares of stock in corporations, other than banks and trust companies, engaged in the loan and investment business were taxed in substantially the same manner in all four years as were the shares of stock in the Jesse F. Stevenson Company. You will find that the assessed value of the shares of corporation stock was placed upon the tax list under the head of "Moneys and Credits" and taxed at the moneys and credits rate of five mills on the dollar."
(R. 582.)

Upon cross examination the auditor testified that in so listing the shares upon the tax list, he acted under his own interpretation that the statutes of the state gave him the right, as county auditor, to make changes, and that such changes, were made after taking the subject up with the legal advisers of the board of supervisors and county auditor. (R. 243.) The auditor also testified that during the years 1919 and 1920 the taxes upon the shares of the Security Loan & Investment Company were originally computed at the consolidated millage rate applied to twenty-five percent of the assessed value. That after the tax list had been certified to the county treasurer for collection he changed the list so as to place such shares in the column "moneys and credits" and subjected them to a tax at the five mill rate. Similar changes were made in the case of the Des Moines Joint Stock Land Bank, the Central Iowa Joint Stock Land Band and the Des Moines Morris Plan Bank for the years 1921 and 1922. (R. 229 to 235 inclusive.) The auditor testified that such changes were made so as to take such shares from the "high levy" to "moneys and credits" and to

reduce the amount of the taxes upon the shares of such corporations. (R. 230.)

The Banking Business of Petitioner.

The petitioner, during the years in question, carried the accounts of a number of correspondent banks, located in various parts of Iowa and loaned money and handled re-discounts for such correspondents. (R. 561.) It made loans to automobile dealers in Des Moines and elsewhere in Iowa, secured in some instances by liens on motor vehicles in storage or in transit. (R. 562); in other instances, collaterally secured by notes of purchasers of cars. In other instances, loans were made on the open, unsecured note of the dealer. The petitioner made loans to contractors engaged in the construction of public improvements and frequently accepted public improvement bonds or assessment certificates in payment of the advances to the contractors. (R. 564.) It made first mortgage loans on farm lands in various parts of Iowa, and on Des Moines real estate (R. 564). It made loans to enable borrowers to purchase and feed cattle for market, secured in some instances by endorsement or by liens on the cattle, in other instances open notes evidenced such loans (R. 565). It rediscounted for correspondent banks, notes of customers, secured by chattel mortgages on cattle. (R. 565.) It made loans to individuals in amounts of less than $300.00; 564 such loans were made in 1919; 464, in 1920; 642, in 1921; and 692 in 1922 (R. 565). It dealt in United States Government bonds, foreign government and municipal bonds. It sold bonds of S. W. Strauss & Company, and in the years 1921 and 1922 purchased and sold to its customers, industrial, railroad and public utility bonds. It carried on the usual phases of the banking business. (R. 566.)

The petitioner offered in evidence excerpts from the annual reports of the Comptroller of the Currency, which disclosed that during the years 1919 to 1922 National Banks in Des Moines, and other cities and towns in Iowa, held substantial amounts of loans secured by mortgages on improved real estate, loans secured by warehouse receipts covering commodities in storage and in transit, and discounted acceptances and commercial paper collaterally secured by liens on merchandise, cattle, stocks, bonds and other personal property. (R. 623 to 642.) The reports of the Comptroller of the Currency also disclosed that during the four years National Banks in Des Moines, and other cities and towns in Iowa, held large amounts of United States Government bonds and notes, state, county and municipal bonds, industrial, railroad, public utility and other public service corporation bonds and notes. (R. 629, 633, 635, 636, 639, 642.)

The adjudication in Munn, county treasurer, v. Des Moines National Bank, 18 Fed. (2) 269.

During the four years in question, the Des Moines National Bank, a corporation organized under the national banking laws, the Bankers Trust Company and the Iowa Loan & Trust Company, corporations organized under the laws of Iowa, were all engaged in the banking business in Des Moines. On January 20, 1923, these banks filed bills in equity in the United States District Court for the Southern District of Iowa against the county treasurer of Polk County. These bills sought injunctions against the collection of all taxes upon the shares of stock of the plaintiffs in excess of five mills on the dollar of assessed valuation. (R. 841.) The basis for the relief sought was the same set up by petitioner in this suit. On May 5, 1925 a Special Master appointed to

hear the evidence and report his conclusions of fact and law to the Court, filed his report in which he found as follows:

> "Conclusion: It is my conclusion that moneyed capital in the hands of individual citizens of this state and living in Des Moines, Iowa, was taxed at five mills on the dollar of actual valuation, and that substantial amounts of such moneyed capital was so taxed during the years 1919, 1920, 1921 and 1922, and that it was the habitual practice of the taxing officers of Polk County to so tax moneyed capital in the hands of individuals, and that it was intentionally so done by them. That the complainants are entitled to relief and that the defendant, or his successor in office, should be enjoined from collecting or attempting to collect taxes from the complainants in excess of a sum computed at five mills on the dollar of the assessed valuation of the shares of stock of each of said complainants for the four years in question, as such sums are set forth in the table in division VII hereof, together with interest upon such sums at the rate of 6% per annum from the date they were payable." (R. 952.)

Exceptions were filed to the said report but were overruled, and a decree was entered by said court in each of said suits perpetually enjoining the collection of taxes upon the said shares at rates in excess of five mills on the dollar (R. 970 to 974, inc.). An appeal was prosecuted to the Circuit Court of Appeals for the Eighth Circuit, which upon submission affirmed the judgment of the District Court, the opinion of the Circuit Court of Appeals being dated February 28, 1927, and appears on pages 977 to 994, inclusive, of the Record. This opinion is reported in 18 Fed. (2d) 269. The board of supervisors of Polk County paid bills for reporters, witnesses', and attorneys' fees, court costs, printing bills, for appellant in said cause. (R. 741.) The shares of the Des Moines National Bank and Bankers Trust Company were ultimately taxed at but five mills on the dollar during the years involved. (R. 759.)

The Iowa Supreme Court Decision.

The action was tried in the District Court of Polk County, Iowa, which rendered a decree denying to the petitioner the relief sought without findings of fact or of law, and without an opinion by the presiding judge; petitioner perfected an appeal to the Supreme Court of the State of Iowa. The Opinion of the Iowa Court, which was concurred in by five Justices, four members of the court dissenting and filing a dissenting opinion, sets out the method of taxation applied to the shares of petitioner. Following this statement, the majority opinion says:

> "During these years *a large number of domestic corporations employing, as we shall assume, moneyed capital, in competition with plaintiffs in Des Moines in like* form made to the assessor their sworn statements. The assessor in these cases used the same classification and assessment, applied to the capital of these corporations the same basis of assessment and made up and returned to the county auditor the assessment rolls and the assessor's books in identically the same form and on the same basis as in the case of the assessments against the plaintiffs.
>
> The county auditor in some of these assessments against competing corporations fixed the taxable value at 20 per cent of the actual value and applied the consolidated levy as in the case of the plaintiffs. After the tax books had passed into the hands of the treasurer, but before payment, the county auditor changed these assessments as they appeared upon the tax books to assessments of moneys and credits and applied to them the five-mill levy. As to the rest of the assessments of the competing domestic corporations the county auditor instead of entering on the tax books the assessments as taxes upon "corporate stock" and applying the consolidated levy upon 20 per cent of the valuation, extended them on the tax books as "moneys and credits" and applied the five mill levy on the dollar of actual valuation under Section 1310 and 1311, Code Supplement 1913.

During these years there were in the City of Des Moines a large number of persons and a few foreign corporations, who, as we shall assume, were employing moneyed capital in competition with plaintiffs. The assessor classified and assessed this competing capital as "moneys and credits". He made up the assessment rolls and assessor's books accordingly and returned them to the county auditor. The county auditor extended these assessments upon the tax books as "moneys and credits" and applied to them the five mill levy upon the actual net valuation." (R. 1341 and 1342.)

The majority then hold that although under the statutes of Iowa the method of assessment and taxation of the shares of petitioner was clearly defined, and mandatory upon the taxing officials, nevertheless as to the large number of individuals and corporations owning moneyed capital in substantial amounts which were assessed as "moneys and credits" and taxed at five mills upon the dollar of actual valuation, petitioner's remedy was solely by appeal from the action of the assessing bodies. As to the corporations in competition with petitioner in the taxing district in said years, the shares of stock of which were assessed as "corporation stock", but whose assessments were changed by the county auditor to "moneys and credits", and thereby subjected to a tax at but five mills on the dollar, petitioner was not entitled to the relief prayed because the county auditor acted unlawfully in making such change, notwithstanding that under the statutes of the State, he was the official to whom was remitted the power of making up the tax lists and in making up the tax lists he acted under advice of counsel for the Board of Supervisors. The opinion further holds that the acts of the county auditor being unlawful were not binding upon the State and its political subdivisions for the auditor was a mere usurper of authority; since the State was not bound by the acts of the county auditor, its right to collect taxes upon the moneyed capital at the consolidated millage rate

was not barred. This conclusion was reached by the Iowa Supreme Court notwithstanding that seven years had elapsed since the date when the last taxes upon such moneyed capital became payable, and notwithstanding the further fact that there was neither pleading nor proof that respondents had ever attempted to make collection of the taxes upon such moneyed capital except at the five mill rate, nor that they expected to attempt such collection in the future.

SPECIFICATION OF ERRORS.

Your petitioner further shows that the final decision and judgment of the Supreme Court of Iowa, affirming the judgment of the District Court of Polk County, Iowa, is erroneous in the following respects:

a. Because the said decision and judgment of the Supreme Court of Iowa denies to petitioner the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States, in that in the administration of the statutes of Iowa by officers of the State and its political subdivisions there was an intentional, systematic, general, and habitual method or plan of taxation whereby large and substantial amounts of other moneyed capital within the meaning of Section 5219 of the Revised Statutes of the United States were taxed at rates from one-fifth to one-seventh as much as the taxes imposed upon the assessed value of the shares of the petitioner.

b. Because by said decision and judgment the said Supreme Court of Iowa held that there was no intentional, systematic, general, and habitual method or plan of taxation in the administration of the statutes of Iowa by officers of the State and its political subdivisions whereby large and substantial amounts of other moneyed capital within the meaning of Section 5219 of the Revised Statutes of the United States were taxed at rates of from one-fifth to one-seventh as

much as the taxes imposed upon the assessed value of the shares of petitioner.

c. Because by said decision and judgment the Supreme Court of Iowa held that the acts of the county auditor in making the tax list, or in making changes in the tax list so as to subject the shares of stock of competing corporations to a tax from one-fifth to one-seventh as much as the tax to which petitioner's shares were subjected were illegal and void acts of a merely ministerial or clerical officer, were a mere nullity, were the result of usurped authority, and were not the acts of the State taken through its duly constituted officers, and were not binding upon it.

d. Because the said decision and judgment of the Supreme Court of Iowa held that the State and all of its authorized officials "have acted in the utmost good faith and in accordance with the constitutional and statutory rights of petitioner."

e. Because by said decision and judgment the Supreme Court of Iowa held that there was no discrimination in the levy or assessment as between the petitioner and competing corporations and that the State had not knowingly and wilfully discriminated in the collection of taxes.

f. Because the said decision and judgment of the Supreme Court of Iowa denied to petitioner its rights arising under the Fourteenth Amendment to the Federal Constitution and Section 5219 of the Revised Statutes of the United States upon the ground, in part, that it did not appear that the illegal acts of the county auditor were ever called to the attention of the board of supervisors, the executive council, the department of justice, the legislature, or any of the authorities of the State who had any power of supervision or duty to enforce correction of the misfeasances of the county auditor or county treasurer.

g. Because the decision and judgment of the Supreme Court of Iowa held that it was not bound by the decision of the Circuit Court of Appeals for the Eighth Judicial Circuit in *Munn v. Des Moines National Bank*, and *Munn v. Bankers Trust Company*, 18 Fed. (2) 269, which decision became final, and which decision was of the identical questions and upon the identical facts involved in this case and constituted an adjudication binding upon respondents.

h. Because said decision and judgment of the Supreme Court of Iowa held that as to other moneyed capital in the hands of individuals and foreign corporations assessed by the assessor, reported by him to the board of review, approved by that board, entered upon the tax books, and so returned to the county auditor as "moneys and credits" and subjected to taxes at five mills on the dollar of assessed valuation, petitioner had an available remedy by appeal from the board of review, and that such remedy was exclusive.

SUMMARY OF ARGUMENT.

I.

The State of Iowa has by Sections 1310, 1322 and 1322-1-a Code Supp. 1913, exercised its right of classification for the taxation of shares of stock in national banks, state banks and "moneyed capital within the meaning of Section 5219 of the Revised Statutes of the United States" and thereby has placed all of such property in one class for taxation purposes. The State has therefore adopted and made a part of its law the classification made by Congress as to national banks in Section 5219 of the Revised Statutes.

Section 1310 Code Supplement 1913.
Section 1322 Code Supplement 1913.
Section 1322-1-a Code Supplement 1913.
Munn v. Des Moines National Bank, 18 Fed. (2), 269.

A.

The Constitution and statutes of Iowa require uniformity in the taxation of shares of national banks and state banks and trust companies.

Security Savings Bank v. Board of Review, 189 Iowa, 463.
Munn, Treas. v. Des Moines Nat. Bank, 18 Fed. (2) 269.

B.

Since the State of Iowa has exercised its power of classification by placing shares of national banks, state banks and trust companies and all "moneyed capital within the meaning of Section 5219 of the Revised Statutes of the United States", in one class for purposes of taxation, the Fourteenth

Amendment to the Constitution of the United States will protect the shareholders in state banks against deliberate, systematic and intentional discrimination arising through the improper administration of the State law by the taxing officers of the State.

Security Savings Bank v. Board of Review, 189 Iowa, 483.
State Bank v. Endres, 192 N. W. 322 (Neb.).
People, ex rel. v. Golafogle, 137 N. E. 611.

C.

The record discloses and the opinion of the Iowa Supreme Court concedes that substantially material amounts of moneyed capital (as that term is defined in Section 5219 of the Revised Statutes) were subjected to taxation at five mills on the dollar in the same taxing district while the shares of petitioner were taxed at rates from five to seven times greater. Since petitioner is entitled to be accorded substantially identical treatment with that to which national banks are entitled, it follows that the taxes upon the shares of petitioner in excess of five mills upon the dollar were illegal and void.

First National Bank of Hartford v. City of Hartford, 273 U. S. 548.
Minnesota v. First National Bank of St. Paul, 273 U. S. 561.
Merchants National Bank of Richmond v. Richmond, 256 U. S. 635.
First National Bank of Guthrie Center v. Anderson, 269 U. S. 341.
First National Bank v. Chapman, 173 U. S. 205.
Merchants & Mfgs. National Bank v. Penn, 167 U. S. 461.
Amoskeag Savings Bank v. Purdy, 231 U. S. 373.
Mercantile National Bank v. New York, 121 U. S. 138.
Boyer v. Boyer, 113 U. S. 689.
Evansville National Bank v. Britton, 105 U. S. 322.

Whitbeck v. Mercantile National Bank, 127 U. S. 193.
Supervisors Albany County v. Stanley, 121 U. S. 535.
People ex rel. v. Weaver, 100 U. S. 539.
Eddy, County Treasurer v. First Nat'l Bk. of Fargo, 275 Fed. 550, (C. C. A. 8th Circuit).
Allen Munn, Treasurer v. Des Moines Nat'l Bank, 18 Fed. (2d) 269, (C. C. A. 8th Circuit).

II.

A tax law as it leaves the legislative hands may not be obnoxious to any challenge upon constitutional grounds, and yet the officers of the State charged with the administration of that valid tax law may so act under it in the matter of assessment or collection as to work a trespass upon the property rights of the taxpayer, prohibited by the Fourteenth Amendment to the Constitution of the United States. See *Reagan v. Farmers Loan & Trust Co.*, 154 U. S. 362.

A.

The record here discloses that the auditor in preparing the tax lists followed an intentional, systematic and uniform plan by which a gross discrimination between the shares of petitioner and the shares of competing corporations was created. The statutes as administered by the county auditor produced in this case a gross discrimination against the shares of petitioner, in violation of Section One of the Fourteenth Amendment of the Constitution of the United States.

Sunday Lake Iron Co. v. Wakefield, 247 U. S. 350.
Cummings v. Merchants National Bank, 101 U. S. 151.
Greene v. L. & I. Ry. Co., 244 U. S. 499.
L. & N. Rd. Co. v. Greene, 244 U. S. 522.
Illinois Central R. Co. v. Greene, 244 U. S. 555.
Raymond v. Chicago Union Traction Co., 207 U. S. 20.

Sioux City Bridge Co. v. Dakota County, 260 U. S 441.
C. & N. W. R. Co. v. Osborne, 265 U. S. 14.
Iowa Central Ry. Co. v. Board of Review, 176 Iowa, 131.
Reagan v. Farmers Loan & Trust Co., 154 U. S. 362.
Munn, Treasurer v. Des Moines National Bank, 18 Fed. (2d) 269.

III.

The decision of the Iowa Supreme Court that the acts of the county auditor in placing the assessments upon the shares of competing corporations on the tax list as "moneys and credits" and taxing them at the five mill rate was not binding on the State, is clearly untenable. The Statutes of Iowa remit to the county auditor the duty of preparing the tax lists. The statutes of the State constitute the county auditor a public official and delegate to him certain duties in connection with the imposition of taxes within the county. The State may not set up machinery for the imposition and collection of taxes, and by means of that machinery unlawfully exact taxes from petitioner, in violation of the restrictions imposed by the Constitution of the United States and escape the obligation of making restitution by declaring that the action of the officers was not the action of the State.

Code of Iowa, Supp. 1913, Sec. 1072.
Code of 1897, Section 1387.
Section 1385.
Code Supp. 1913, Section 1383.
Code Supp. 1913 Section 1385-b.
Chapter 343 Laws 37th G. A.

IV.

The holding of the majority opinion of the Iowa Supreme Court that the State and its political subdivisions have the power to remove any discrimination against the shares of

petitioner by enforcing payment upon the shares of competing corporations at the consolidated millage rate is without foundation in the record and denies petitioner a Federal right upon wholly untenable grounds. There is neither pleading nor proof that the taxing officers of Polk County have undertaken, or ever expect to collect further taxes upon the shares of competing corporations taxed at the five mill rate during the years 1919 to 1923 inclusive. The suggestion is purely speculative and without foundation in the record.

Montana Nat. Bank v. Yellowstone County, 276 U. S. 500.

V.

The taxes here involved were exacted of petitioner in violation of Section One of the Fourteenth Amendment. The evidence discloses that the payment was not voluntary but was made under compulsion and to avoid the accumulation of additional penalties. The petitioner has a Federal right to have such illegal taxes refunded to it, and the arbitrary denial of a refund of taxes exacted in violation of the Constitution of the United States is in itself a denial of the equal protection of the law prohibited by the Fourteenth Amendment.

Ward v. Love County, 253 U. S. 17.
Carpenter v. Shaw, 280 U. S. 364.
Munn, Treasurer v. Des Moines National Bank, 18 Fed. (2d) 269.

VI.

Under the statutes of Iowa as construed by the Supreme Court, the assessor and board of review had no power to assess the shares of petitioner as "moneys and credits". The method of assessment and taxation upon petitioner's shares was mandatory upon the assessing bodies. Resort to the

board of review would therefore have been futile, and could afford petitioner no remedy as to the assessment upon its own shares. As to the moneyed capital assessed by the assessor and board of review as "moneys and credits", petitioner's only remedy would have been by way of appeal from the assessment upon each individual item of moneyed capital, which would involve the taking of several hundred separate appeals. When the laws of a State, as construed by the highest court require a taxpayer, who is discriminated against by the systematic undervaluation of other property, or improper classification thereof, to appeal from the assessments upon all other property within the taxing district, the law violates the Fourteenth Amendment to the Constitution of the United States because it denies to the aggrieved taxpayer the equal protection of the law and is equivalent to no remedy at all. The requirement of the majority opinion that petitioner's exclusive remedy as to the moneyed capital assessed as "moneys and credits" was by way of appeal from the board of review, denies petitioner the equal protection of the law and denies petitioner due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States.

Sioux City Bridge Co. v. Dakota County, 260 U. S. 441.

Raymond v. Chicago Union Traction Co., 207 U. S. 20.

Central of Georgia Railroad Co. v. Wright, 207 U. S. 127.

Turner v. Wade, 254 U. S. 64.

Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287.

VII.

The identical cause of action determined by the Supreme Court of Iowa was decided in the case of *Munn v. Des Moines National Bank, et al.*, 18 Fed. (2) 269. As a re-

sult of the decision in the *Munn* case, the moneyed capital represented by the shares of the Des Moines National Bank and the Bankers Trust Company was taxed at but five mills on the dollar during the years now involved. The determination of the Circuit Court of Appeals in the *Munn* case was a final judgment, since no effort was made to have it reviewed in this Court. Under these circumstances, the determination of the Federal Courts and the taxation of the shares of the Des Moines National Bank and Bankers Trust Company pursuant to such determination are binding upon the State Courts and require that the moneyed capital represented by the shares of petitioner shall be accorded taxation at the same rates.

Des Moines National Bank v. Fairweather, 191 Iowa, 1240.

First National Bank of Estherville v. City Council, 150 Iowa, 95.

Des Moines National Bank v. Des Moines, 153 Iowa, 336.

A.

By Section 128 of the Judicial Code the Circuit Court of Appeals was invested with final jurisdiction in the case of *Munn v. Des Moines National Bank, et al.*, and its decision became final. In that case the same issues were tendered and decided as are involved in this case. The respondents in this case are in privity with the appellant Munn in the Circuit Court case. The State and its political subdivisions entered appearances, conducted the defense and paid the expenses incident to the conduct of that litigation. Under these circumstances, the adjudication in the *Munn* case is binding upon the respondents.

ARGUMENT.

I.

Under the State and Federal Constitutions, the State Legislature of Iowa had the undoubted power of making reasonable classifications of property for taxing purposes. The Legislature exercised this power by enacting Sections 1310, 1322 and 1322-1-a, Code Supp. 1913, which required the assessment and taxation of all shares in national banks, state banks and trust companies and "all moneyed capital within the meaning of Section fifty-two hundred nineteen of the Revised Statutes of the United States" at uniform rates; that is, the consolidated levy applied to twenty per cent of the assessed value of the shares or moneyed capital. It will thus be seen that the State by the enactment of these statutes has adopted the identical classification for the taxation of the shares of state banks and trust companies which was adopted by the Congress of the United States by the enactment of Section 5219 of the Revised Statutes. The only distinction between the Statutes of Iowa and the Statutes of the United States upon this subject is that the statutes of Iowa are positive in the requirement that shares of state and national banks and "moneyed capital" *shall be taxed at the same rates* while the Federal statute *prohibits* the taxation of national shares at "greater rates than are assessed upon moneyed capital". In view of the provisions embodied in the statutes of Iowa, there can be no question but that uniformity is required in the taxation of shares of state banks and national banks, and as said by Circuit Judge Sanborn in *Munn v. Des Moines National Bank, supra:*

> "The nature of the cases and the issues contended and adjudged are practically identical. The Constitution and Statutes of Iowa protect the rights of the shareholders of the other two banks (state banks) to the same

extent as the rights of the shareholders of the Des Moines National Bank are protected by Section 5219 of the Revised Statutes and the Constitution of the United States."

It is practically conceded by the majority of the Iowa Supreme Court that uniformity in taxation is required as between the shares of state banks and the shares of national Banks. Indeed, under the previous holdings of the Iowa Supreme Court there can be no question concerning it for it was said by the Iowa Court in *Security Savings Bank v. Board of Review*, 189 Iowa, 463:

> "The plaintiff in this case is not a national bank. But, we must construe the statute as to it to precisely the same effect as if it were such. If we were to adopt a construction herein as to this plaintiff which if applied to a national bank would be violative of the Federal Statute Section 5219, we should thereby set a precedent which we could not follow in the event that a national bank were the litigant. We should thereby destroy the very uniformity aimed at by the Statute as being essential to its operative power upon national banks. Therefore, though the plaintiff is not a national bank, it is entitled to insist upon a uniform construction of the statute which shall be operative as against all banks. For this reason we must in construing our own statute, take account of the construction by the United States Supreme Court of the Federal Statute. The significance of this feature of the case we shall note later. * * * "If this disputed item of $27,000.00 herein could not have been assessed against a private banker under Section 1321, then under the Federal Statute, Section 5219, it could not be assessed against the shares of a national bank. If it could not be assessed against the shares of a national bank, uniformity in the application of the statute would require the same rule to operate in favor of the plaintiff bank."

The majority opinion of the Iowa Supreme Court in this case does not deny that petitioner is entitled to be accorded in the enforcement of the taxing statutes, the same treatment

to which a national bank is entitled. The Supreme Court of Iowa denied relief here to both state and national banks and the opinion clearly indicates that if the shares of one class of banks are entitled to relief, the other would likewise be entitled to the same relief. There can be no question therefore but that if the Iowa-Des Moines National Bank, petitioner in No. 711 (1931 Term No. 15) is entitled to relief, the petitioner herein is likewise entitled to demand identical treatment.

The majority opinion of the Supreme Court of Iowa concedes that during the years in question there were relatively large and substantial amounts of moneyed capital in the hands of individual citizens the taxes upon which were computed at but five mills on the dollar. This moneyed capital consisted of two classes:

1. Stock in domestic corporations engaged in various phases of the loan and investment business in the same field in which petitioner was engaged. These shares were assessed on the identical basis as the shares of petitioner, and discrimination arose from the fact that in making up the tax lists, the county auditor of Polk County deliberately, intentionally and systematically placed all assessments upon the shares of such competing corporations under the column "moneys and credits" and applied to the assessed valuation a tax of five mills on the dollar, at the same time applying the consolidated millage tax to 20 per cent of the assessed value of petitioner's shares, thus imposing a tax upon the shares of petitioner from five to seven times greater than was imposed upon the shares of competing corporations.

2. Money in the hands of individuals, foreign corporations and copartnerships engaged in various phases of the loan and investment business, and money in the hands of individual taxpayers representing loans and investments, all of which was assessed as "moneys and credits" and taxed at five mills on the dollar.

In view of the decision of the Court below, a recitation of the evidence which abundantly establishes the existence of moneyed capital is unnecessary. Suffice to say that the Supreme Court of Iowa could not have arrived at any other conclusion upon the record before it. This Court has defined "moneyed capital" as the term is used in Section 5219 as including "all shares of stock or other interests owned by individuals in all enterprises in which the capital employed in carrying on the business is money, and the object of the business is the making of a profit by its use as money. It includes money in the hands of individuals employed in a similar way, invested in loans or securities for the payment of money, either as an investment of a permanent character or temporary, with a view to resale or repayment and reinvestment".

See *Mercantile National Bank v. New York*, 121 U. S. 138.

In the recent case of *First National Bank of Guthrie Center v. Anderson*, 269 U. S. 341, this Court had occasion to review a decision of the Iowa Supreme Court which had denied a National bank relief from alleged discriminatory taxation. This Court in that opinion said:

> "The restriction on the taxation of the shares often has been considered by this court. The earlier decisions have been reviewed from time to time in later cases, and all, taken collectively, may be summarized as showing, so far as is material here * * *
>
> 1. The purpose of the restriction is to render it impossible for any state, in taxing the shares, to create and foster an unequal and unfriendly competition with national banks, by favoring shareholders in state banks or individuals interested in private banking or engaged in operations and investments normally common to the business of banking. *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 155, 30 L. Ed. 895, 901, 7 Sup. Ct. Rep. 826; *Des Moines Nat. Bank v. Fairweather, supra*, 116 (68 L. Ed. 190, 44 Sup. Ct. Rep. 23).
>
> 2. The term "other moneyed capital" in the restriction is not intended to include all moneyed capital not

invested in national bank shares, but only that which is employed in such way as to bring it into substantial competition with the business of national banks. *Mercantile Nat. Bank v. New York, supra,* 157 (30 L. Ed. 902, 7 Sup. Ct. Rep. 826); *First Nat. Bank v. Chehalis County,* 166 U. S. 440, 461, 41 L. Ed. 1069, 1078, 17 Sup. Ct. Rep. 629.

3. Moneyed capital is brought into such competition where it is invested in shares of state banks or in private banking, and also where it is employed, substantially as in the loan and investment features of banking, in making investments, by way of loan, discount or otherwise, in notes, bonds or other securities with a view to sale or repayment and reinvestment. *Mercantile Nat. Bank v. New York, supra,* 155-157 (30 L. Ed. 901, 902, 7 Sup. Ct. Rep. 826); *Palmer v. McMahon,* 133 U. S. 660, 667, 668, 33 L. Ed. 772, 775, 776, 10 Sup. Ct. Rep. 324; *Talbott v. Silver Bow County,* 139 U. S. 438, 447, 35 L. Ed. 210, 213, 11 Sup. Ct. Rep. 594.

4. The restriction is not intended to exact mathematical equality in the taxing of national bank shares and such other moneyed capital, nor to do more than require such practical equality as is reasonably attainable in view of the differing situations of such properties. But every clear discrimination against national bank shares and in favor of a relatively material part of other moneyed capital employed in substantial competition with national banks is a violation of both the letter and spirit of the restriction. *New York v. Weaver,* 100 U. S. 539, 25 L. Ed. 705; *Boyer v. Boyer,* 113 U. S. 689, 701, 28 L. Ed. 1089, 1092, 5 Sup. Ct. Rep. 706; *First Nat. Bank v. Chapman,* 173 U. S. 205, 216, 43 L. Ed. 669, 673, 19 Sup. Ct. Rep. 407."

The rule was again repeated by this court in the case of *First National Bank of Hartford v. City of Hartford,* 273 U. S. 548.

The record discloses that during the four years the assessments upon the shares of competing corporations ranged from approximately $2,000,000.00 to more than $6,000,000.00; while the assessments upon moneyed capital in the hands of individuals, copartnerships and non-resident corporations

in competition with petitioner varied from $1,500,000.00 to more than $2,000,000.00. The existence of large and relatively material amounts of moneyed capital in the same taxing district in competition with petitioner was thus abundantly established.

We pass next to a consideration of the question of the rate of taxation imposed upon such moneyed capital. In the statement of the case, we have with some particularity set forth the testimony of the county auditor during the years 1921 and 1922. This witness was also chief deputy in charge of the tax department of the auditor's office in the years 1919 and 1920. This witness repeatedly testified, both on direct and cross examination that all assessments of corporation stock, except assessments upon the stock of banks and trust companies, were uniformly and intentionally taxed at but five mills on the dollar. In order that the matter may not escape the attention of the court, we again set forth the following excerpts from the record.

> "With the exception of banks and trust companies the taxes upon the assessments of corporation stock were computed on the basis of five mills on the dollar for the year 1919 * * * that was true also of the year 1920. There were no assessments upon shares of stock of any corporation in the City of Des Moines during the years 1919 and 1920 other than the shares of banks and trust companies which *were taxed* at a rate in excess of five mills upon the dollar. The same is true of the years 1921 and 1922." (See R. 241.)

Continuing, the auditor testified:

> "When the taxes upon the shares of such corporations were put on the tax lists at the five mill rate, they were put there during the two years that I was county auditor (1921 and 1922) with the intention that the taxes would be so collected by the county treasurer's office; and so far as I know that was true of the taxes that were computed and spread on the tax lists during the years 1919 and 1920." (R. 242.)

The auditor again testified:

> "Shares of stock in corporations other than banks and trust companies engaged in the loan and investment business were taxed in substantially the same manner in all four years as were the shares of stock in the Jesse F. Stevenson Company. You will find that the assessed value of the shares of corporation stock was placed upon the tax lists under the head of 'moneys and credits' and taxed at the moneys and credits rate of five mills on the dollar." (R. 582.)

The tax lists for each of the years involved were in evidence. The statutes required the county auditor in the preparation of the tax lists to provide a separate column showing the date of payment. Page 383 of Exhibit 261, being the tax list for 1919, is reproduced in the record as a typical example of the tax list, and shows the payment by the Security Loan and Investment Company of taxes computed on the five mill basis on March 31, 1920, and on September 30, 1920, and the payment by Jesse F. Stevenson Company of taxes computed on the five mill basis on the same dates. (R. 1027.) E. R. Bennett, one of the respondents in the case, and who was county treasurer at the time of payment testified that he had instructed his deputies and clerks to accept money for taxes as shown by the tax books whenever the amount offered was the amount shown to be due by the tax lists. (R. 727.) The county auditor testified that when he made the tax lists, and placed thereon the shares of such corporations employing competing moneyed capital, he did so with the intention that the taxes would be so collected at the five mill levy by the county treasurer's office, and that there were no assessments on the shares of stock of any corporation in the city of Des Moines during the years 1919 to 1922, other than the shares of banks and trust companies, which were taxed at a rate in excess of five mills on the dollar, nor was there any moneyed capital, whether

in the hands of individuals or in the form of shares of stock of corporations, that was in fact taxed on the same basis with the shares of stock in banks and trust companies. We have heretofore pointed out that under the statutory provisions in effect at the times involved in this suit, the county treasurer was required by statute to collect the taxes as entered upon the tax lists, and the tax lists constituted his authority for such collection.

The statement in the majority opinion of the Iowa Court that the payment of taxes by such competing capital at but five mills on the dollar is shown only by inference and mutual assumption of the parties is not sustained by the record and is clearly erroneous.

Thus the record shows without dispute that large and material amounts of moneyed capital (within the meaning of the term as defined by this Court) in the hands of individual citizens of the State in the same taxing district as petitioner were taxed at grossly discriminatory rates compared to the rates imposed upon the shares of petitioner in each of the years involved. That such action constitutes a direct violation of the restrictions found in Section 5219 of the Revised Statutes of the United States is clearly established. Since petitioner was entitled, under the laws of Iowa, to identical treatment with that to be accorded the shares of national banks, and since the law of Iowa places the shares of national banks, the shares of petitioner, and "moneyed capital" in the same class for taxation purposes, petitioner was entitled to have its shares taxed at the lawful rate upon the shares of national banks. We submit, therefore, that petitioner was entitled to the relief asked.

II and III.

During the years in question the statutes of Iowa required that shares of stock in national and state banks, loan and

trust companies, private banks and "all moneyed capital within the meaning of Section 5219 of the Revised Statutes of the United States" should be taxed at the same rates. Sec. 1310 Code Supp. 1913, which was in force during the period in question provided as follows:

> "All moneyed capital within the meaning of Section 5219 of the Revised Statutes of the United States shall be listed and assessed against the owner thereof at his place of business, and, if a corporation, at its principal place of business, at the same rate as state, savings, national bank, and loan and trust company stock is taxed in the same taxing district and at the actual value of the moneyed capital so invested."
>
> (Section 1310, Supp. to the Code of Iowa 1913, Sec. 1322, 1322-1-a, Supp. to the Code of Iowa 1913).

It will thus be seen that the State of Iowa adopted the classification made by Congress in Section 5219 of the Revised Statutes and that the Legislature of the State contemplated uniformity in taxation between the shares of petitioner and "moneyed capital". Such plan of taxation provides uniformity between bank shares and moneyed capital, and is entirely consistent with the restrictions imposed by the Federal law.

The city assessor of Des Moines during the four years involved testified with respect to the assessment of moneyed capital in the hands of individuals as follows:

> "When it came to the assessments in the hands of individuals or partnerships of notes, bonds, mortgages, securities, or other evidences of indebtedness, the assessments were made on form No. 2 of the assessment roll. If there were moneys and credits to be taxed, the net amount to be taxed was brought forward and entered on form No. 1 of the assessment roll. That was the method of assessment followed by me as city assessor and by the deputies under my direction in the assessment of notes, bonds, mortgages, evidences of indebtedness, and credits, in the hands of individuals and partnerships in these years." (R. 622.)

We have already seen that assessments upon the shares of corporations engaged in the loan and investment business within the taxing district were made upon the same basis as the assessments upon petitioner's shares and were subsequently changed by the auditor and taxed at the five mill rate.

It was the further claim of petitioner that as the result of the intentional, systematic, habitual, and arbitrary administration of the tax laws of Iowa by its officers and the officers of its political subdivisions there was a substantial discrimination in the taxation of its shares as compared to the taxation of other moneyed capital within the meaning of Section 5219 of the Revised Statutes of the United States and within the class created by Sections 1310, 1322, and 1322-1-a, Iowa Code Supplement 1913, and that thereby there had been denied to petitioner the equal protection of the law, contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States. It is firmly settled by the decisions of this Court that the purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. *Sunday Lake Iron Co. v. Wakefield*, 247 U. S. 350; *Sioux City Bridge Co. v. Dakota County*, 260 U. S. 441; *Cummings v. Merchants National Bank of Toledo*, 101 U. S. 153; *Greene v. L. & I. Railway Co.*, 244 U. S. 499; *Chicago & N. W. Ry. v. Osborne*, 265 U. S. 14; *Raymond v. Chicago Union Traction Company*, 207 U. S. 20.

Upon this phase of the case the testimony of the auditor conclusively shows that he acted intentionally and as a result of a plan or system. He testified as follows:

"There were no assessments upon the shares of stock of any corporation in the City of Des Moines during the years 1919 and 1920, other than the shares of banks and

trust companies, which were *taxed at a rate in excess of five mills upon the dollar.* The same is true of the years 1921, and 1922.

Q. Now with respect particularly to companies that were engaged in the business of making mortgage loans, investment companies and companies that were engaged in the purchase and sale of commercial paper, and similar concerns, what is the fact as to the rate at which the shares of stock of such corporations were taxed during the entire four year period?

A. They were assessed five mills on the dollar.

Q. Do you mean the five mill rate was applied to the assessed value of such shares?

A. It was.

When the taxes upon the shares of such corporations were put on the tax list at the five mill rate, they were put there during the two years that I was county auditor with the *intention* that the taxes would be *so collected by the county treasurer's office;* and so far as I know, that was true of the taxes that were computed and spread on the tax list during the years 1919 and 1920."

(R. 242.)

"Q. Now with respect to the year 1919, where corporations were engaged in business in the City of Des Moines, how were the shares of stock of such corporations taxed when they were certified over on the assessor's book as "corporation stock"?

A. They were placed in the column headed "moneys and credits" and *taxed at five mills on* the dollar.

Q. Were the shares of stock of corporations so assessed placed on the tax list as moneyed capital, and taxed at the consolidated levy rate?

A. Not to my knowledge, no sir."

(R. 239.)

Some of the taxes upon the shares of competing corporations were first computed at the consolidated millage rate and in such cases the witness changed the tax list after it was made up. In each instance, the auditor testified that he knew the consolidated millage rates, and that he intended by making the changes to subject the shares of the individual

corporation to a tax at but five mills on the dollar. Thus with respect to the 1919 taxes upon the shares of the Security Loan & Investment Company, the auditor says:

"Q. Did you intend by the change that you made to subject the shares of stock of this corporation to a tax of but $423.10?

A. I think it was done to change it from the high levy to moneys and credits, which it should be assessed under.

Q. Did you do it intentionally with the idea of imposing a tax of five mills on the dollar on the assessed valuation of the shares of stock in the corporation for that year?

A. I did."

(R. 230.)

With respect to a similar change in the taxes upon the shares of the Des Moines Joint Stock Land Bank, the auditor says:

"When I made the change I intended thereby to *subject* the shares of stock in the Des Moines Stock Land Bank to a *tax* of only five mills on the dollar of the assessed valuation. The change was made intentionally for the purpose of making the taxes upon the shares of the Des Moines Joint Stock Land Bank for the year 1921 at the rate of 5 mills on the dollar of the assessed valuation and no more."

(R. 232.)

With respect to the Central Iowa Joint Stock Land Bank, the taxes upon the shares of which were originally computed at the consolidated millage rate, the auditor says:

"When I made the change in the computation of taxes upon the shares of stock of the Central Iowa Joint Stock Land Bank, I *intended* to *subject* the shares of that corporation to a tax of five mills on the dollar and no more, and I intended that the taxes on the shares of that corporation should be collected by the county treasurer on the five mill basis."

(R. 233.)

Similar evidence was given with respect to the changes made by the auditor in connection with the taxes upon other corporations. With respect to the taxation of the shares of the Jesse F. Stevenson Company for the year 1919, the auditor testified:

> "Q. By whose authority was the assessment upon the shares of Jesse F. Stevenson & Company placed upon the tax list in the 'moneys and credits' column and taxed at five mills on the dollar?
>
> A. Under authority of the County Auditor, according to law."

It is well established by the decisions of this Court that when the statutes of a State are habitually and systematically administered by the officers, charged with the duty of enforcing them in such a way as to produce a deliberate discrimination, such conduct upon the part of the State and its taxing officers constitutes a denial of the equal protection of the law in violation of the Fourteenth Amendment. The principle was thus stated by Mr. Justice Brewer speaking for the Court in *Reagan v. Farmers Loan & Trust Company*, 154 U. S. 362, in which it was said:

> "Neither will the constitutionality of the statute if that be conceded, avail to oust the Federal Court of jurisdiction. A valid law may be wrongfully administered by officers of the State and so as to make such administration an illegal burden and exaction upon the individual. A tax law as it leaves the legislative hands may not be obnoxious to any challenge and yet the officers of the State charged with the administration of that valid tax law may so act under it in the matter of assessment or collection as to work an illegal trespass upon the property rights of the individual."

The rule is thus stated by Mr. Justice McReynolds in *Sunday Lake Iron Company v. Wakefield*, 247 U. S. 350:

> "The purpose of the equal protection clause of the 14th Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. And it must be regarded as settled that intentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property."

In *Cummings v. Merchants National Bank of Toledo*, 101 U. S. 153, this Court had before it a case in which it appeared that the shares of corporations generally had been taxed at a fraction of their actual value while the shares of bank stock had been assessed at full value. This Court held that the action of the State constituted a violation not only of Section 5219 of the Revised Statutes but also a violation of the Fourteenth Amendment. In the course of the opinion, it is said:

> "Independently of this Statute (Sec. 5219), however, we are of opinion that when a rule or system of valuation is adopted by those whose duty it is to make the assessment, which is designed to operate unequally and to violate a fundamental principle of the Constitution, and when this rule is applied not solely to one individual, but to a large class of individuals or corporations, that equity may properly interfere to restrain the operation of this unconstitutional exercise of power. That is precisely the case made by this bill, and if supported by the testimony, relief ought to be given."

A most exhaustive discussion of the controlling principles is found in the case of *Greene v. Louisville & Interurban Railway Co.*, 244 U. S. 499. There it appeared that all property in the State was uniformly assessed at from 40 to 70

per cent of its fair value, while the property and franchises of the plaintiff were assessed at 90 to 100 per cent of actual value. The assessment upon the Railway Company was made by the State Board of Equalization which was not charged with any duty as to the assessments upon other property generally in the State. This Court held that the equal protection clause of the Fourteenth Amendment applied alike to all of the taxing agencies of the State. The opinion of the Court was delivered by Mr. Justice Pitney who said:

> "Uniformity in taxing implies equality in the burden of taxation; and this equality of burden cannot exist without uniformity in the mode of the assessment, as well as in the rate of taxation." *Exchange Bank v. Hines*, 3 Ohio St. 1, 15, quoted in *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153, 158, 25 L. Ed. 903, 905.
>
> It is equally plain that it makes no difference what basis of valuation—that is, what percentage of full value—may be adopted, *provided it be applied to all alike.* The adoption of full value has no different effect in distributing the burden than would be gained by adopting 75 per cent, or 50 per cent, or even 10 per cent as the basis—so long as either was applied uniformly. The only difference would be that, supposing the requirements of the treasury remained constant, the rate of taxation would have to be increased as the percentage of valuation was reduced. (Under Sec. 171 of the Constitution, the rate of taxation may be varied by the general assembly from year to year, according to requirements.) Therefore, the principal if not the sole reason for adopting "fair cash value" as the standard for valuations is as a convenient means to an end,—the end being equal taxation. But if the standard be systematically departed from with respect to certain classes of property, while applied as to other property, it does not serve, but frustrates the very object it was designed to accomplish. It follows that the duty to assess at full value cannot be supreme in all cases, but must yield where necessary to avoid defeating its own purpose."

The record in this case demonstrates that the county auditor in so making the tax list as to subject the shares of petitioner to grossly discriminatory taxation when compared to other moneyed capital in the hands of individuals in each of the years involved acted intentionally and with the purpose, during the whole course of time involved in this case, of bringing about the taxation of such other moneyed capital at such grossly favorable rates. This is shown by the direct admission of the county auditor and by the further fact that his acts were taken only after he had the benefit of legal counsel for the board of supervisors. That his acts were habitual and continuous is clearly disclosed by the record. There was no other moneyed capital than the shares of stock of banks and trust companies which was subjected to taxes at as great rates as the taxes imposed upon petitioner's shares. Thus, there is undoubted support for the statement of the Justices of the Supreme Court of Iowa who concurred in the dissenting opinion in this connection, as follows:

> "It is shown by the record, that the capital of national banks in the city of Des Moines during the years in question was about three million dollars, while that of state banks was from four and one-half to six million dollars. The assessments upon the shares of stock found from the evidence to be competing institutions during said years, varied from about one and one-half millions in 1919 to an excess of five millions in 1922, and, under the rule laid down by the italicized portion of *First National Bank of Hartford v. City of Hartford, supra*, there has been a clear violation of section 5219 of the Revised Statutes of the United States.
>
> The action, hereinbefore mentioned, of the county auditor, was intentionally done. It applied to all of the assessments upon the shares of stock of the competing corporations. Therefore, within the meaning of the authorities from which quotations are hereinbefore given, to wit, *Reagan v. Farmers' Loan & Trust Company*, 154 U. S. 362, 14 S. Ct. 1047, 38 L. Ed. 1014; *Sioux City*

Bridge Company v. Dakota County, 260 U. S. 441, 43 S. Ct. 190, 67 L. Ed. 340, 28 A. L. R. 979; *Cummings v. Merchants' National Bank of Toledo*, 101 U. S. 153, 25 L. Ed. 903; *Raymond v. Chicago Union Traction Company*, 207 U. S. 20, 28 S. Ct. 7, 52 L. Ed. 78, 12 Ann. Cas. 757, and the other cases cited in connection therewith, an illegal discrimination has been worked against the appellant national banks and their shareholders by systematic, intentional, wrongful, and arbitrary administration of the law. In order for the appellant national banks to be entitled to relief, it is not a prerequisite that the action of the county auditor was done with intent to injure said banks. See *Taylor v. L. & N. R. Co.*, (C. C. A.) 88 F. 350."

(R. 1377.)

But it is said by the Iowa Supreme Court that the authorities to which we have referred are inapplicable to the instant case because the auditor in applying the five mill rate to the assessments upon the shares of competing corporations was acting in violation of the statutes of the state, and that his action was not binding upon the state because he did not represent it and was a mere usurper of authority. This conclusion is wholly untenable. Section 1072 Code of Iowa, Supp. of 1913, creates the office of county auditor, provides for his election and the tenure of office; Section 1383, Code Supp. 1913 requires the auditor to transcribe all assessments certified to him from the several townships, towns and cities into a book to be known as the tax list, in which shall be entered the names of the taxpayers, descriptions of land, number of acres and value, number of town lots and value, value of personal property with appropriate columns for polls and payments. By statute it is made the duty of the county auditor to compute the taxes upon each assessment by applying the proper millage levies in the various townships, cities, towns, school districts, etc. He is required before December 31st of each year to deliver the completed tax list to the county treasurer. The list constitutes the

county treasurer's authority for the collection of the taxes therein levied. Code 1897, Sec. 1387. The county auditor has authority to correct any error in the assessment or tax list and may assess and list any property omitted from taxation. Section 1385-b Code Supp. 1913. Townships, cities, towns, counties, school districts and other local taxing districts are required to certify to the county auditor the money needs of the taxing district for the ensuing year in dollars, and the auditor is required to determine the millage levy which will be required to raise the amount of money so certified by the local bodies and to apply same to the assessed valuations in making up the tax list. Chapter 343, Laws of the 37th G. A. The county treasurer is required to collect the taxes shown upon the tax list. Code 1897 Sec. 1390. The treasurer has no authority to correct errors in the tax list but must give receipt to taxpayers upon tender of the amount shown by the tax list. He is also required to furnish the taxpayer a statement in writing of the taxes due as shown by the tax list. Code 1897, Sec. 1396 and 1397.

The mere assessment of values imposes no tax. The collection of tax payments is an act which can only be consummated after the imposition of a tax. Taxes are imposed by law, but the law in Iowa remits to the county auditor the application of the levy to the values, and he is the only agent of the state, or any of its political subdivisions, invested by law with authority to impose the ultimate amount upon the taxpayer which represents his due proportion of the cost of government. It is an essential step in the fixation of tax liability in Iowa that the county auditor prepare the tax list. Perhaps he has no duty imposed upon him by law so important and so far-reaching in its effect as this duty. To say that he is not a duly constituted agent of the state and its political subdivisions in connection with the imposition of taxes such as involved in this case is to deny the express and unequivocal language employed by the legislature of

the state in erecting the machinery for the exaction of the funds necessary for conducting the business of government.

Indeed, the Supreme Court of Iowa in its prior decisions has recognized the county auditor as a duly constituted agent of the state and its political subdivisions in connection with the imposition of taxes, and awarded relief where the county auditor in the performance of such duties acted illegally. In *Northwestern Bank of Ireton v. Van Roekel*, 202 Iowa 237, the court had under consideration the action of the county auditor in increasing the assessment of the Northwestern Bank, a private bank, by the sum of $50,000. It held that the auditor in increasing the assessment departed from the objective of the legislature of the state to obtain substantial uniformity in the method of assessing state, national and private banks, and affirmed the judgment of the district court setting aside such additional assessment made by the county auditor. Involved in the case was the question of the taxation of costs, and in considering that portion of the district court's judgment which taxed the costs of the proceeding to the county auditor, the court said:

> "We do not think that the costs should have been taxed against the auditor personally. *He acted officially and in good faith, and under the advice of counsel.*" (Italics ours.)

And the Supreme Court of Iowa in *Fort Madison Security Company v. Maxwell* 202 Iowa 1346, held that the county auditor of Lee County acted illegally and beyond his power in listing upon the tax list the shares of stock of the Fort Madison Security Company as "moneyed capital" when such shares had been assessed by the assessor as "moneys and credits", and awarded relief to the Fort Madison Security Company by reason of the illegal and unauthorized act of the county auditor.

The holding of the Iowa Supreme Court that the action of the county auditor was not binding upon the State is, we submit, wholly untenable. Having delegated authority to the county auditor to prepare the tax lists, to apply the various levies to the assessed values, and to transmit the tax lists when completed to the county treasurer, who is required to collect the taxes therein shown, can it be said that the county auditor in performing this statutory duty is not an agent of the State? There can be but one answer. The auditor is a necessary and vital part of the machinery provided by the State for the assessment and collection of taxes. The auditor acts pursuant to authority granted by the State, and his action is the action of the State.

The State of Iowa through its Legislature has adopted, for taxation purposes the identical classification made by Congress in Section 5219 of the Revised Statutes of the United States. The effect, upon petitioner's rights, is the same as though the Iowa Legislature had in so many words re-enacted Section 5219 as a part of the laws of Iowa pertaining to the taxation of state banks. That an officer of the State to whom was delegated the duty of administering the tax laws deliberately, systematically and intentionally adopted a plan or method of administering those laws so as to produce a direct discrimination against the shares of petitioner is shown by the evidence in this case. Under the authorities which we have cited, such action by the State constitutes a violation of the Fourteenth Amendment which, of course, is binding upon the State and all its agencies. We submit that the State may not set up machinery for the imposition and collection of taxes, and by means of that machinery, exact taxes upon the shares of petitioner in violation of the Fourteenth Amendment, and then escape all obligation of making restitution by declaring that the action of its officers was not the action of the State. The opinion of the Supreme

Court of Iowa fails to recognize the Federal rights of petitioner and is clearly erroneous.

IV.

In the opinion of the Supreme Court of Iowa it is said:

> "While the lawfully imposed assessments against the competing corporations stand as having been made by the same method and at the same rate as those against the plaintiffs and the right to collect them does not appear to be barred and it is not shown that the State or its duly constituted officers do not intend to collect such taxes, it cannot be said that plaintiffs have suffered from unequal competition because the State has collected from the national banks a larger tax in proportion than it has yet collected from the competing corporations. This record falls far short of showing that unequal or unfriendly competition has been in any wise created, fostered or encouraged by the State or those charged with the administration and enforcement of the law. * * *"
> (R. 1355-1356.)

This statement is clearly erroneous and without support in the record. It is conceded by the Supreme Court that when the tax lists were prepared and certified to the treasurer for collection the discrimination complained of by petitioner existed. The opinion of the Supreme Court of Iowa holds that it is necessary not only for petitioner to establish that discrimination then existed, but also that there is no intention on the part of the officers of the State to remove that discrimination at some time in the future. It is not true that discrimination can only result from the failure of the State and its political subdivisions to *ultimately collect* taxes from all taxpayers in the same class at the same rates. Section 5219 of the Revised Statutes and the Fourteenth Amendment to the Constitution of the United States apply to the imposition of taxes as the result of an intentional, systematic, habitual, and arbitrary method or plan of the officials in

charge of the enforcement of the tax laws of the State. Discrimination, forbidden by Section 5219 of the Revised Statutes and by the Constitution of the United States, results whenever the agents of the State are authorized to collect taxes at discriminatory rates.

In the instant case, in each of the four years, when the county auditor transmitted to the county treasurer the tax lists for collection, discrimination arose. The record shows that this discrimination has continued for a period of nearly ten years, and there is neither pleading nor proof that the officers of the State have any intention of removing such discrimination by collecting, or attempting to collect, any additional taxes upon moneyed capital in competition with petitioner. Indeed, the record affirmatively shows that many of the corporations which were taxed at such grossly favorable rates have since gone out of business, sold their assets, or become merged with other corporations, and that further collection from such corporations is impossible. The rights of petitioner, guaranteed it by the Federal Statute and by the Fourteenth Amendment to the Federal Constitution, were infringed when the tax lists were lodged with the county treasurer authorizing him to collect taxes at the discriminatory rates; and to say that such federal right can now be defeated by applying the logic of the majority opinion of the Iowa Supreme Court is merely an avoidance of federal rights upon an untenable ground.

We must confess that we are surprised that such a palpably erroneous rule should be put forward by a majority of the Iowa Supreme Court, because the majority opinion itself refers to the decision of this Court in *Montana National Bank v. Yellowstone County*, 276 U. S. 499, in which the fallacy of the majority opinion of the Iowa Court is shown. In that case it appeared that in a suit by a state bank the Supreme Court of Montana construed the statutes of the state as requiring the taxation of *shares* in national banks, and the

taxation of *property* of state banks. Following this rule, the taxing officers deducted all tax-exempt securities in arriving at the value of the property of the state banks, but included such securities in fixing the value of national bank shares. And thus a clear discrimination arose against the shares of national banks, which rendered the tax upon national banks invalid under the rule in *Home Savings Bank v. Des Moines*, 205 U. S. 503. Subsequently the Supreme Court of Montana held that its former decision was wrong, and that the proper construction of the statutes required that the shares of both state and national banks be taxed. In the meantime the discrimination had arisen because the taxing officers followed the first decision. To defeat a refund it was urged that the taxing officers of the county could go back and re-assess the shares of the state banks and thus remove any possible discrimination. This Court, in the opinion by Mr. Justice Sutherland, disposed of this contention in these words:

> "But it is said that the taxing officers of the county, in view of the later decision, now have the power to tax the shares of state banks and thus bring about an equality. As to this it is unnecessary to say more than that it nowhere appears that these officers, if they possess the power, have undertaken to exercise it or that they have any intention of ever doing so. It will be soon enough to invite consideration of this purely speculative suggestion when, if ever, the taxing officials shall have put it into practical effect."

In the instant case, as in the case cited, "it nowhere appears that the officers have undertaken to exercise the power to tax the shares of competing corporations and thus bring about equality". The 1919 taxes were payable in 1920. The 1922 taxes were payable in 1923. The decision of the Iowa Supreme Court was rendered on September 26, 1930. The instant case differs from the *Yellowstone County* case in that the contention was not even advanced on behalf of the

taxing officers,—it was injected into the case by the majority opinion of the Supreme Court. There is neither pleading nor proof to support the opinion, and we submit that a mere unsupported possibility that the discrimination may be, in part, removed at some time in the future is insufficient to support a denial of federal rights under the circumstances disclosed by this record.

The record discloses that during the years 1919 to 1923, petitioner was involved in litigation to determine its right to deduct from the assessed value of its shares, liberty bonds and other government securities exempt from state taxation under the laws of the United States. By stipulation, petitioner's case was to await the determination of the case of *Des Moines National Bank v. Fairweather*, 191 Iowa, 1240; 263 U. S. 103. That case was determined by this Court on November 12, 1923. Under the laws of Iowa 6 percent additional penalty is added to all personal taxes if not paid before December 1st in the year in which due. On November 30, 1923, petitioner paid taxes amounting to $57,856.41 including penalties and interest of $12,187.98. Had payment been delayed another day an additional 6 percent penalty would have accrued. See Exhibits 1680 and 1681. (R. 1001, 1002.)

We believe that we have demonstrated that the taxes upon the shares of petitioner, so far as they exceed five mills upon the dollar, were levied in violation of the Fourteenth Amendment to the Constitution of the United States. If we are correct in this position, the State and its taxing officers were without power to exact these taxes from petitioner and where as here, the taxes were exacted under compulsion and to avoid the imposition of additional penalties, the State is under obligation to make restitution. The exaction

of taxes which are unlawful because in violation of the Fourteenth Amendment itself constitutes a violation of Federal rights.'

Thus, in *Carpenter v. Shaw*, 280 U. S. 363, it appeared that a tax had been imposed upon Indian landowners against their royalty interest in petroleum and natural gas, and the Supreme Court of Oklahoma held that the tax applied to lands which were themselves exempt from taxation in the hands of Indian allottees under the federal law. A statute of Oklahoma denied to taxpayers the right to recover taxes unless the taxes were paid at the time when due. It appeared that the Indians had paid the taxes under protest but not until after the same became delinquent. This Court, speaking by Mr. Justice Stone, there said:

> "The Supreme Court of Oklahoma also rested its denial to petitioners of the right to recover the 1926 tax upon the ground that, having failed to pay the tax for the year when due, they were barred by the provisions of Sections 9971 and 9973 of the Compiled Oklahoma Statutes for 1921. Under these sections, relief by injunction against the collection of any tax is forbidden and a suit to recover a tax alleged to be illegally assessed is allowed only if paid 'at the time and in the manner provided by law.' But the petitioners' allegations, admitted on demurrer, are that the tax was paid under duress and compulsion to prevent the issue of respondent's warrant for its collection, to prevent the stopping by respondent of further royalty payments to them, and to prevent the accumulation of statutory penalties. These allegations are sufficient to bring the case within the ruling of this court in *Ward v. Love County*, 253 U. S. 17, 64 L. Ed. 751, 40 Sup. Ct. Rep. 419, that a denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by complusion is itself in contravention of the 14th Amendment. * * *"

The case of *Ward v. Love County*, cited in the *Carpenter* case, arose under somewhat similar circumstances. The county had collected taxes upon the lands of Indian allot-

tees which were exempt from taxation under the laws of the United States. The Supreme Court of Oklahoma denied recovery of the taxes because the money had been distributed to the various taxing districts of the state. Mr. Justice Van Devanter, speaking for the Court, said:

> * * * "To say that the county could collect these unlawful taxes by coercive means, and not incur any obligation to pay them back, is nothing short of saying that it could take or appropriate the property of these Indian allottees arbitrarily and without due process of law. Of course, this would be in contravention of the 14th Amendment, which binds the county as an agency of the state."

The record discloses that petitioner paid penalties amounting to $12,187.98 in addition to the illegal taxes. It was threatened with the imposition of an additional penalty of 6% if payment was delayed another day. The taxes were exacted in violation of the Federal Constitution. Petitioner sought a refund of the taxes by a mandamus action, the exclusive remedy afforded it under the laws of the State as construed by the highest court. See *Steele v. Madison County*, 198 Iowa 902. If the taxes were illegal there is clearly a federal right to have them refunded. This right was erroneously denied by the decision of the court below.

VI.

In each of the years involved there were in the City of Des Moines a large number of persons, and a few foreign corporations, who were employing moneyed capital in competition with petitioner. The assessor classified and assessed this competing capital as "moneys and credits." He made up the assessment rolls and assessor's books accordingly, and returned them to the county auditor. The county auditor extended these assessments upon the tax books as "moneys

and credits" and applied to them the five mill levy upon the net valuation, which resulted in a much lesser tax than if said moneyed capital had been subjected to taxation at the same rate as that imposed upon petitioner's shares. After making the assessments of moneyed capital, the assessor submitted the same to, and they were approved by the board of review, which was composed of the city council of the City of Des Moines.

Although admitting the existence of a clear discrimination in connection with the taxation of such moneyed capital, the Supreme Court of Iowa denied to petitioner a recovery for the reason that, under its holding, petitioner was required to appear before the board of review and object to the discriminatory assessment of such moneyed capital in the hands of such large number of persons and foreign corporations, and to appeal from the action of the board of review to the District Court of Iowa. It was held that this was the exclusive remedy afforded to petitioner by the statutes of Iowa.

Under the laws of Iowa as construed by the Supreme Court, the manner of assessment and taxation of bank shares is mandatory, and the officers charged with the duty of assessing and taxing such capital act in a purely ministerial capacity. It is the mandatory duty of the assessor to fix the value of bank shares upon the basis of the statement required to be submitted by the bank correctly showing the amount of its capital, surplus, and undivided earnings. It is the mandatory duty of the auditor to apply the consolidated millage tax to 20% of such assessed value. None of the officers are charged with any discretion in the taxation of the stock of state and national banks. Under the decisions of the Iowa Supreme Court neither the assessor nor the Board of Review possessed the power to assess petitioner's shares as "moneys and credits", and a resort to the board of review, so far as the assessment upon petitioner's shares is concerned, would have been utterly futile.

In the case of *First National Bank of Remsen v. Hayes, County Auditor*, 186 Iowa 892, the assessor had allowed certain deductions from the assets which affected the assessed value of the bank's shares. The auditor corrected the assessments. The Iowa Supreme Court, in discussing the power of the assessor and auditor, said:

> "Enough has been said to indicate that the duty performed by the assessor in ascertaining the value of bank stock is merely ministerial in its nature. All exacted of him is accurate computation. In estimating the value of other property, he is required to determine its value according to his best judgment, and therein exercises a *quasi-judicial* function. See *Talley v. Brown*, 146 Iowa 360. A ministerial act has been defined as 'one which a person or board performs upon a given state of facts, in a prescribed manner, in observance of the mandate of legal authority, and without regard to or the exercise of his own judgment upon the propriety of the act being done.' * * *
>
> "Here, the assessor is merely required to make computation from the statements furnished him, and must have, in the performance of his duty as assessor, assessed the shares of stock in the bank in accordance with computations actually made, and therein performed purely ministerial duties; and he should have assessed the bank stock in accordance with such computation. Whether he made a mistake in computation or undertook to exercise his judgment in ascertaining the value of the shares of stock is not material. In either event, the error in the assessment was such as contemplated in Section 1385-b of the Code Supplement, 1913, and the auditor acted within his authority in making the corrections."

In *Avoca State Bank v. Burke, County Auditor*, 193 Iowa 1055, it appeared that the assessor and board of review had allowed certain deductions from the assessed value of the shares on account of what was designated as "reserve for doubtful paper." This reserve was not reflected on the books of the bank, but was claimed by the bank in a letter which accompanied the tax statement. The auditor corrected the assess-

ment upon the shares by rejecting the deduction allowed by the assessor, and fixed the assessment at the total capital, surplus, and undivided profits of the bank as required by statute. The Iowa Supreme Court said:

> "* * * While it is doubtless true that the board of review could have corrected the error if it had discovered it, yet the failure of the board of review to correct the erroneous item did not validate it. If the assessor lacked the power to approve it as a deduction, it necessarily followed that the board of review lacked power also. We must hold, therefore, that the county auditor did have power to strike out the item. It follows that the order of the district court must be reversed. * * *"

See also *First National Bank of Council Bluffs v. Burke, County Auditor,* 196 N. W. 287, wherein the Iowa Supreme Court said:

> "* * * It must be remembered that we are dealing with a mandate found in legislative enactment. The assessments in question are mandatory. Nothing is left to the discretion or judgment of the assessor, board of review, or taxing official. Nothing is left to any subordinate body to determine in what amount, against whom it shall be levied, or the manner or method of making the assessment and the apportionment. The statute itself fixes and determines the base of the assessment, and consequently any correction is mathematical and purely ministerial in its character. The bank itself furnishes the verified statement disclosing the data specified in the statutory requirement. The statute leaves nothing for the assessor or the board of review to do, except to correctly compute the percentage of each shareholder. It is a problem in arithmetic, and the elements or factors of the problem are furnished by the bank. The statute prescribes the method in the solution of the problem."

Under these decisions of the highest court of Iowa it is clear that neither the assessor, the board of review, nor the District Court on appeal therefrom, possessed any power to

assess the shares of petitioner as "moneys and credits". The decision in the instant case declares that the remedy provided by Sec. 7235 is not available to petitioner, in so far as the assessment of competing capital owned by individuals as contra-distinguished from the stock of competing domestic corporations is concerned, but that petitioner in such respect was remitted to an appearance before the local board of review. The decision of the Iowa Court in this case does not point out what relief the board of review could have accorded petitioner under the former decisions which we have cited. It merely declares that as to the moneyed capital assessed as "moneys and credits" petitioner's remedy of appearance before and appeal from the board of review was exclusive. We have seen that under the previous pronouncements of the Iowa Court, complaint to the board of review with a demand that petitioner's shares be assessed as "moneys and credits" would have been absolutely futile. If the Supreme Court of Iowa, by its decision means to say that petitioner had a remedy by appearance before the board and complaint as to the assessment of its own shares as "corporation stock" it is apparent that the petitioner was required to do a futile thing. Indeed the situation in which petitioner would be placed would be identical with that of the plaintiff in *Montana National Bank v. Yellowstone County*, 276 U. S. 499 from which we have already quoted in the argument.

There, it will be remembered, discrimination against the shares of a national bank arose because the law as originally construed by the highest court of the state, required the taxation of *shares* of national banks and the taxation of *property* of state banks, thus allowing state banks to escape taxation upon their tax exempt securities, which privilege was denied to national banks. When a national bank sought a refund of the taxes upon its shares because of this discrimination the Montana Supreme Court reversed itself, de-

claring the previous decision erroneous. It was also urged that petitioner in that case should have availed itself of an administrative remedy by appearance before the assessing board. This argument was promptly overruled by this court. We quote from the opinion of Mr. Justice Sutherland:

> "Finally, it is urged that plaintiff in error may not maintain this action because of its failure to apply to the county board of equalization for an administrative remedy. We do not stop to inquire whether under any circumstances such remedy was open to the taxpayer, for the short answer is that the decision of the Supreme Court of Montana in the *Rogers* case would have rendered any such application utterly futile since the county board of equalization was powerless to grant any appropriate relief in the face of that conclusive decision. See *Hills v. National Albany Exch. Bank*, 105 U. S. 319, 321, 26 L. ed. 1052, 1053; *Whitbeck v. Mercantile Nat. Bank*, 127 U. S. 193, 199, 32 L. ed. 118, 120, 8 Sup. Ct. Rep. 1121."

The application to the instant case is clear and needs no further extended discussion. None of the decisions of the Iowa Supreme Court cited in the opinion had been handed down when the assessments were being made, nor when petitioner paid its taxes in November 1923. Nor has the Iowa court ever overruled its pronouncements to the effect that the statues of the state make it the mandatory duty of the assessor and board of review to assess the shares of petitioner as "corporation stock" or personal property. We say therefore that this case is "on all fours" with the Montana case, and that the decision of the Court below that petitioner had an available remedy by appeal from the board of review will not support a denial of a refund of taxes which were concededly levied in violation of Section 5219 of the Revised Statutes.

While it has never yet been suggested during the history of this litigation it may be urged that petitioner had an adequate remedy by appearance before the board of review and complaint to that body as to the improper assessments upon the moneyed capital assessed as "moneys and credits". The opinion of the Iowa court does not indicate that it was intended to adopt such a construction, but as the same may be urged by counsel for respondents we shall next give some attention thereto. Section 1373 Code Supplement 1913, now Section 7135 Code of 1927, which was in force at the times the matters in controversy arose is as follows:

> "Complaint to board of review—appeal. Any person aggrieved by the action of the assessor in assessing his property may make oral or written complaint thereof to the board of review, which shall consist simply of a statement of the errors complained of, with such facts as may lead to their correction, and any person whose assessment has been raised or whose property has been added to the assessment rolls, as provided in the preceding section, shall make such complaint before the meeting of the board for final action with reference thereto, as provided in said section, and appeals may be taken from the action of the board with reference to such complaints to the district court of the county in which such board holds its sessions, within twenty days after its adjournment. Appeals shall be taken by a written notice to that effect to the chairman or presiding officer of the reviewing board, and served as an original notice. The court shall hear the appeal in equity and determine anew all questions arising before the board which relate to the liability of the property to assessment or the amount thereof, and its decision shall be certified by the clerk of the court to the county auditor, who shall correct the assessment books in his office accordingly. Any officer of a county, city, town, township or school district interested or a taxpayer thereof may in like manner make complaint before said board of review in respect to the assessment of any property in the township, city or town and an appeal from the action of the board of review in fixing the amount of assessment on any property con-

cerning which such complaint is made, may be taken by any of such aforementioned officers. Such appeal is in addition to the appeal allowed to the person whose property is assessed and shall be taken in the name of the county, city, town, township or school district interested and tried in the same manner, except that the notice of appeal shall also be served upon the owner of the property concerning which the complaint is made and affected thereby or person required to return said property for assessment. Upon trial of any appeal from the action of the board of review fixing the amount of assessment upon any property concerning which complaint is made, the court may increase, decrease or affirm the amount of the assessment appealed from. (32 G. A. ch. 60, Sec. 1; 18 G. A. ch. 109 Sec. 1; C. '73, Sec. 831; R. Sec. 740.)"

This section it will be readily seen by its terms merely gives to "any officer of a county, city or town or a taxpayer the right to make complaint before said board of review in respect to the assessment of any property in the township, city or town, and an appeal from the board of review in fixing *the amount of assessment on any property concerning which such complaint is made, may be taken by any of such aforementioned officers.*" A taxpayer may make complaint but he has no right of appeal except as to his own property. The only person who can take an appeal in such case is the "*officer*" of the city or town. Is the existence of such a remedy as disclosed by the statute which we have quoted a sufficient basis for denying to petitioner a refund of taxes and penalties exacted of it by compulsion in violation of the laws and Constitution of the United States? We desire to call the attention of the Court to the situation in which petitioner was placed when the board of review was in session.

The record shows that there were several thousand assessments upon individuals, foreign corporations and copartnerships which had been made by the assessor as "moneys and credits". These assessments included real estate con-

tracts, purchase money mortgages, open accounts, money on deposit in banks, currency, judgments, liens, bills of exchange, and choses in action, as well as notes, bonds and mortgages evidencing loans of the taxpayer's funds in competition with the business of petitioner. They were all mingled upon the assessment rolls so that it was impossible to determine which items should have been assessed as "moneyed capital" and which were properly assessed as "moneys and credits". An extended investigation as to the property returned on each assessment roll was necessary before it could be said that an improper assessment had been made as "'moneys and credits". The time fixed by the statutes of Iowa for the taxpayer to make complaint before the board was but a few days, (in fact the Board of Review could not exist for more than thirty days under the statutes of the State). The Supreme Court of Iowa had held that a taxpayer coming before the board for relief must state his grievance with

> "sufficient particularity, and must specify his complaint with such certainty as to enable the tribunal, supposing it to possess ordinary intelligence to comprehend and understand the matters of which complaint is made, and to grant the particular relief sought for in the complaint. He is not entitled to have any question determined on appeal except such as he called the tribunal to determine in the first place."
>
> *First National Bank v. City of Council Bluffs*, 182 Iowa, 107.

The board of review, composed of the members of the City Council of the city, was not a judicial body. It had no power to issue subpoenas, require the attendance of witnesses, nor require the production of books or papers of the taxpayers assessed on the moneys and credits basis. The competitors of petitioner who were escaping more than 80 per cent of the taxes which they should pay would not of

course volunteer testimony in aid of petitioner. It was neither practical nor possible for petitioner to have searched out, learned and stated to the city council, within the time required by statute, the errors of which they complained with the necessary facts which would lead to their correction—much less to have had the city council determine the question.

In *Munn v. Des Moines National Bank, supra,* which involved the taxation of bank shares in the same taxing district for the same years as in this case, it was urged before the Circuit Court of Appeals that the plaintiff in that action had an adequate remedy, under the laws of Iowa by appearance before and appeal from the board of review, and so was not entitled to equitable relief in the Federal Courts. The contention was declared without foundation in the opinion by Circuit Judge Sanborn who examined the record with great care. We quote the following from the opinion in the *Munn* case:

> "They rely on the proposition that a taxpayer must exhaust his remedies under the administrative boards before he may have relief by a judicial tribunal and cite many authorities, including *First National Bank v. Weld County,* 264 U. S. 450, 44 S. Ct. 385, 68 L. Ed. 784, and *Griswold Land & Credit Co. v. County of Calhoun,* 198 Iowa, 1240, 201 N. W. 11, two opinions perhaps as favorable to their view as any to which they call attention.
>
> * * *
>
> In each of these cases the property of the complainants had been illegally assessed and taxed too high, and that fact was shown by the public records of which the complainants had legal notice at such times that they could have availed themselves of the remedy offered by the statutes of the state through the administrative boards. It was not so with the shareholders of these banks and the banks themselves. Their grievances were that the property of other taxpayers, taxpayers in whose hands was property that they had used and were using during the years in question in competition with the

normal business of these banks, was by the taxing officers illegally taxed too low. That fact, however, did not appear upon the face of any of the public records, because those records did not separate the taxpayers who had used and were using their moneyed capital in competition with the normal business of these banks from those who had not done and were not doing so, and time, search, and extended investigation after the amounts of the taxes in each year were fixed and disclosed by the public records were indispensable to the discovery and statement of their names and their competing property.

Section 1373 of the Code Supplement of Iowa of 1913 required any person aggrieved by the taxation of his or its property to make an oral or written complaint, which should consist "of a statement of the errors complained of, with such facts as may lead to their correction, * * * before the meeting of the board for final action with reference thereto." The assessment books in each of these years were not completed so that a taxpayer could know what the amounts of his assessments and taxes were until within a few days before the final action of the board of review with reference thereto. The time fixed by the statute for a taxpayer to make his statement to the board of review of the errors he complained of with such facts as might lead to their correction was only a few days. It was a very short time. The Supreme Court of that state had held that the taxpayer coming before the board of review for relief must state his grievance "with sufficient particularity and must specify his complaint with sufficient certainty to enable the tribunal, supposing it to possess ordinary intelligence, to comprehend and understand the matters of which complaint is made, and to grant the particular relief sought for in the complaint. He is not entitled to have any question determined on appeal, except such as he called upon the tribunal to determine in the first place." *First National Bank v. City of Council Bluffs*, 182 Iowa, 107, 112, 113, 161 N. W. 706, 708.

The record in these cases before us shows that the number of instances in which the complainants in this court claim that moneyed capital in the hands of individuals taxable in the county was used in competition with the normal business of these banks and had been

illegally taxed at the five mills' rate in the years under consideration was in the hundreds; that the value of the property that they claimed had been thus illegally taxed was more than $6,000,000; that the number of items of such moneyed capital so taxed was many hundreds. The number of witnesses presented to the court below in the hearing of these cases was more than 150. The testimony was condensed and appears in narrative form, and the printed pages of the record are 599. The tribunal to which these banks must present all their alleged errors and complaints, "with such facts as may lead to their correction" (section 1373), was the city council of the city of Des Moines. The Supreme Court of Iowa had declared that, on an appeal from the board of review to the court from the action of this city council, the complainants would not be "entitled to have any question determined on appeal, except such as he called upon the tribunal (board of review) to determine in the first place." 182 Iowa, 112, 113, 161 N. W. 708.

The city council of Des Moines was not a judicial body. The competitors of these banks and their shareholders that had escaped four-fifths to five-sixths of the taxes they should have paid and their employees were not very likely to volunteer testimony or evidence to sustain the claims of these banks, and the city council had no power to issue subpoenas to compel them to testify. It does not seem to us to have been either practical or possible for the shareholders of these banks, or the banks themselves, to have searched out, learned, and stated to this city council within the times required by section 1373 the errors of which they complained "with such facts as may lead to their correction" (section 1373), much less to have had the city council so determine the questions they present that the complainants could have obtained through the proceeding authorized by section 1373 any just or adequate remedy for the grievances they have presented. In our opinion the facts of these cases, some of which have now been recited, clearly except them from the operation of the proposition that they must exhaust their remedy before the administrative board, because that remedy was not only inadequate but necessarily impractical and futile and the court below had plenary jurisdic-

tion in equity to hear and decide the questions in these cases and to grant adequate relief to the complainants."

The trial of this case in the District Court consumed more than sixteen weeks and more than one hundred and fifty witnesses were called upon behalf of petitioner. To say that petitioner's exclusive remedy under the laws of Iowa to produce all the facts with reference to the ownership and use of moneyed capital by the hundreds of individual taxpayers who were assessed upon "moneys and credits" is to impose upon petitioner an impossible obligation; an obligation which, in the very nature of the case could not be met within the time required. The remedy which the Iowa Supreme Court declares was the exclusive remedy available to petitioner as to the "moneyed capital" improperly assessed as "moneys and credits" was therefore impractical and futile, and amounted to no remedy at all.

This court has consistently held that when the laws of a State, as construed by the highest court require a taxpayer to resort to a remedy which is utterly futile or unavailing it will be held the equivalent of no remedy at all. Such a law violates both the due process and equal protection clauses of the Fourteenth Amendment.

We have already seen that petitioner had no right to appeal from the determination of the board of review with respect to the assessments of others on the moneys and credits basis. This action could only be taken by some public officer. But even if such remedy may be said to be available to a taxpayer in the position in which petitioner found itself, to impose such a requirement violates the equal protection and due process clauses of the Fourteenth Amendment. Thus in *Sioux City Bridge Co. v. Dakota County*, 260 U. S. 441, it appeared that the property of the Bridge Company was assessed at 90 to 100 per cent of actual value while other property generally was systematically taxed at but 50

per cent of actual value. The Supreme Court of Nebraska held that the taxpayer's exclusive remedy was to prosecute appeals from the action of the administrative tribunal, in each case where property had been systematically undervalued. This Court speaking by the late Chief Justice Taft said:

> "The supreme court does not make it clear whether it thinks the discrimination charged was proved or not, but, assuming the discrimination, it holds that the Bridge Company has no remedy except "to have the property assessed, below its true value raised, rather than to have property assessed at its true value reduced." The dilemma presented by a case where one or a few of a class of taxpayers are assessed at 100 per cent of the value of their property, in accord with a constitutional or statutory requirement, and the rest of the class are intentionally assessed at a much lower percentage, in violation of the law, has been often dealt with by courts, and there has been a conflict of view as to what should be done. There is no doubt, however, of the view taken of such cases by the Federal courts in the enforcement of the uniformity clauses of state statutes and constitutions, and of the equal protection clause of the 14th Amendment. The exact question was considered at length by the circuit court of appeals of the sixth circuit in the case of *Taylor v. Louisville & N. R. Co.*, 31 C. C. A. 537, 60 U. S. App. 166, 88 Fed. 350, 364, 365, and the language of that court was approved and incorporated in the decision of this court in *Greene v. Louisville & Interurban R. Co.*, 244 U. S. 499, 516-518, 61 L. ed. 1280, 1289, 1290, 37 Sup. Ct. Rep. 673, Ann. Cas. 1917E, 88. The conclusion in these and other Federal authorities is that such a result as that reached by the supreme court of Nebraska is to deny the injured taxpayer any remedy at all because it is utterly impossible for him, by any judicial proceeding, to secure an increase in the assessment of the great mass of underassessed property in the taxing district. This court holds that the right of the taxpayer whose propery alone is taxed at 100 per cent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed, even though this is a departure from the requirement of statute. The

conclusion is based on the principle that where it is impossible to secure both the standards of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law. In substance and effect, the decision of the Nebraska supreme court in this case upholds the violation of the 14th Amendment to the injury of the Bridge Company. We must, therefore reverse its judgment."

Taylor v. L. & N. Railroad Co., 88 Fed. 350, involved a case of systematic undervaluation of real and personal property by the taxing authorities and the taxation of the property of a Railroad Company at substantially full value. It is there said:

"It is said on behalf of the defendants that the only method consistent with the constitution is by raising the assessments of the real and personal property. This is no remedy at all. It has been suggested (but we cannot regard the suggestion as a serious one) that the railroad companies of the state should go before the taxing authorities of each county, and, after notifying each taxpayer, attempt to secure an increase in the total tax assessment of the real and personal property of the state from $312,000,000 to $416,000,000. The absolute futility of such a course, the enormous expense, and the length of time necessary in attempting to follow it, need no comment."

During the years 1920 to 1922 inclusive, the moneyed capital which was improperly *assessed* and taxed as "moneys and credits" comprised only about twenty-five per cent of the total amount of moneyed capital shown by the evidence. The balance consisted, as we have seen, of shares in competing corporations which were assessed upon the same basis as the shares of petitioner, but as to which the discrimination arose because of the deliberate and systematic acts of the county auditor, in applying the five mill rate thereto. In the year 1919 the moneyed capital assessed as

"moneys and credits" was only about forty per cent of the total. In all four of the years there was a substantial and material amount of such capital assessed upon a basis of equality with the shares of petitioner, but taxed at discriminatory rates. The points considered in this division of the argument are therefore not decisive of the case, even though petitioner's contention be overruled.

We submit, however, that the decision of the Iowa Supreme Court as to this branch of the case is unsound, and that the laws of Iowa, as construed by the highest court of the State in the opinion below, deny to petitioner any remedy at all as to the moneyed capital assessed as "moneys and credits". In this respect the Iowa law is necessarily invalid because in conflict with the laws and Constitution of the United States. We again respectfully call the attention of this court to the rules laid down in *Ward v. Love County* and *Carpenter v. Shaw, supra,* wherein this court holds that taxes exacted in violation of the law and Constitution of the United States by compulsion may be recovered back, and that to deny such right is in itself a violation of the Fourteenth Amendment. The decision of the Court below denies petitioner a Federal right on the ground of the existence of an administrative remedy, which as we have shown was not open to petitioner, and therefore constitutes a denial of the Federal rights asserted. The opinion of the Iowa Court on this branch of the case is in conflict with the decisions of this Court and should be reversed.

VII.

The Des Moines National Bank, Bankers Trust Company, and the Iowa Loan and Trust Company were in each of the years from 1919 to 1922, inclusive, engaged in the general banking business in the city of Des Moines, Polk County, Iowa. Early in 1923 each of these banks instituted in the

United States District Court for the Southern District of Iowa suits against the County Treasurer of Polk County, Iowa, seeking writs of injunction against the collection of more than five mills on the dollar of valuation placed upon their respective shares of stock, as taxes for each of said years. The allegations upon which such relief was sought were substantially identical with the allegations involved in this case as is apparent from the bill of complaint in that case which was introduced in evidence here, and appears in the record at Page 825. The defendant there was represented by the Attorney-General of the state, by the Corporation Counsel of the City of Des Moines, by the special counsel of the board of supervisors of Polk County, and the expense of the litigation was borne by the board of supervisors of Polk County. Issues were joined and testimony taken before a Master, who made a report of his findings, specifically finding among other things that there was in Polk County, Iowa in each of said years 1919 to 1922, inclusive, a relatively large and substantial amount of moneyed capital within the meaning of Section 5219 of the Revised Statutes of the United States, which was subjected to taxation at only five mills on the dollar of assessed valuation; that such moneyed capital was so subjected to taxation at such rate as the result of a systematic, intentional and habitual plan or course of conduct on the part of the taxing officials of Polk County, Iowa, while at the same time the shares of stock of the plaintiffs in said suits were subjected to taxation at the consolidated levy rate applied to twenty per cent (20%) of the assessed value of their shares of stock. Exceptions were taken to the Master's report, and upon being heard, were overruled and decree and judgment in favor of the plaintiffs therein was entered. Whereupon an appeal was perfected for Allen Munn, as County Treasurer of Polk County, Iowa to the Circuit Court of Appeals of the Eighth Circuit, the board of supervisors of Polk County defraying the ex-

penses of such appeal. Such appeal was submitted to and decided by the Circuit Court of Appeals, the decision resulting in the affirmance of the judgment and decree of the District Court. The opinion of the Circuit Court of Appeals and its mandate were introduced in evidence in this case. (Record 975.) The opinion appears in 18 Federal, 2d Series, 269. The decision of the Circuit Court of Appeals became final, and the Des Moines National Bank and the Bankers Trust Company paid taxes at the rate of five mills on the dollar of assessed valuation for each of the years 1919 to 1922, inclusive. Prior to paying taxes for such years, the Iowa Loan and Trust Company was placed in the hands of a receiver and has never paid any taxes for those years.

We have then a situation where, by virtue of the construction placed upon the acts of the taxing officials of the State of Iowa and its political subdivisions, in the identical taxing district, for the very same years involved in these cases, the shares of stock of three institutions engaged in commercial banking in the City of Des Moines in direct competition with the petitioner in each of said years were subjected to taxation at only five mills on the dollar of assessed valuation, while the shares of stock of the petitioner were subjected to taxation at from five to more than six times that rate in said years. There can be no question of the finality and conclusiveness of the judgment in the case of *Munn v. Des Moines National Bank, et al., supra,* as between the parties thereto. By virtue of the lapse of time no further review could possibly be had in those cases. Indeed, pursuant to such judgment the taxing officials of the state and its political subdivisions have accepted, received and receipted for taxes from those institutions for the years involved in this case on the basis of five mills on the dollar. Now, when it is known that the same parties who are defendants in these actions not only were aware of the pendency of that litigation,

but actually assumed, conducted and bore the expense of the defense of that suit, surely there can be no escape from the conclusion that they are bound by the findings and the decision in those cases, and that such are conclusive in this case. That those cases involved a Federal question is beyond any sort of dispute, and involving Federal questions, the decisions of the United States Courts when final are binding, and must be followed by the courts of Iowa. Indeed, the Iowa Supreme Court in *Des Moines National Bank v. Fairweather*, 191 Iowa, at Page 1244, speaking by Mr. Justice Evans, recognized this rule and there said:

> "Such also is the holding of the Federal courts, whose precedents are obligatory upon us upon this question. See *Hannan v. First National Bank*, 269 Fed. 527. The cited case was decided very recently by the Federal Circuit Court of Appeals for this Circuit. It reveiws the previous cases with great care, and holds squarely that there is no conflict between Section 5219 of the Revised Statutes of the United States and Section 1322 of the Code of Iowa.
>
> In view of this pronouncement, it is quite needless that we enter into argument on this feature of the case. Following the Federal holding in the *Hannan* case, we must hold that the first six grounds of complaint set forth in plaintiff's petition must each and all be overruled."

Further, the Iowa Court, in speaking to the question of privity of defendants and the binding effect of a previous judgment upon a defendant in a subsequent case, has said:

> "One who, though not a party, defends or prosecutes an action by employing counsel, paying costs, and doing those things which are generally done by a party, is bound by the judgment rendered therein. *Stoddard v. Thompson*, 31 Iowa, 80; *Marsh v. Smith*, 73 Iowa, 295."

And again, where as here, the judgment claimed to be conclusive was rendered against a political subdivision of a State or its legal representatives, it was held:

> "A judgment against a County or its legal representatives in a matter of general interest to all the people thereof, as one respecting the levy and collection of taxes, is binding not only as against the official representatives of the County named in the proceeding as defendants, but upon all the citizens thereof, though not made parties defendant by name."
> *Cannon v. Nelson*, 83 Iowa 242."

So, we assert that because of the binding effect of the judgment in the case of *Munn v. Des Moines National Bank, et al.* upon the respondents in this case, petitioner was entitled to judgment as prayed.

But we desire the Court to consider the effect of the judgment in the case of *Munn v. Des Moines National Bank, et al., supra*, from another aspect.

That case, as we have shown, involved the taxation of the shares of stock of the Des Moines National Bank, the Bankers Trust Company, and the Iowa Loan and Trust Company, during the years 1919 to 1922 inclusive, which are the same years as are involved in this case. Each of those institutions was engaged in the commercial banking business in Des Moines, Iowa, the location of the business of petitioner. There were involved in those cases Federal questions, namely: the violation through the method of taxation employed by the taxing officials of the State of Iowa and its political subdivisions of the provisions of Section 5219 of the Revised Statutes of the United States, and of the constitutional rights of the plaintiffs in those cases. These Federal questions were resolved in favor of the plaintiff banks in those cases, and the decision of those cases is a finality. So final was the decision that the taxes which were ultimately exacted from the plaintiffs therein was at the

rate of only five mills on the dollar of assessed valuation in each of the years involved. There can be no question of the right of the Federal courts to have decided the Federal questions presented by those cases, nor of the fact that the Federal courts of final resort did decide those questions, and the decision was in favor of the plaintiff banks, who were direct active banking competitors of the petitioner. The decision and judgment in those cases became binding upon the parties thereto and upon everyone else, for that judgment, being a finality, could not be further reviewed. So here we have the taxation in the years 1919 to 1922, inclusive, of the shares of stock of a national and two state banks which were in direct banking competition with the appellants at the rate of five mills on the dollar of assessed valuation. True, this taxation was influenced by and the result of the final decision of the United States Courts, but it was none the less real, and this does not alter the fact that shares of stock of competing banks in Des Moines were taxed at five mills on the dollar in the years involved in this suit, nor was such result any more brought about by the decision of a Federal question than was the result of the application of the decision of *Home Savings Bank v. Des Moines*, 205 U. S. 503, to the case of *First National Bank of Estherville v. City Council*, 150 Iowa 95, where it was held that the holding in the former case was final and conclusive in the latter because it was the final decision of a Federal right by the United States Courts. Such being the state of the law as announced by these decisions, and such being the facts as to which there can be no dispute, we insist that petitioner was entitled to the relief sought.

CONCLUSION.

As we have seen it was established beyond controversy, and the opinion of the court below concedes that during the four years in question there existed in Des Moines, Iowa, large and relatively material amounts of moneyed capital in the form of shares of corporations engaged in the loan and investment business and in the form of moneyed capital in the hands of foreign corporations, co-partnerships and individuals. That this moneyed capital was deliberately, systematically, habitually and intentionally taxed at but five mills on the dollar is clearly established. That such taxation was pursuant to a system, plan or method deliberately adopted by the taxing officers of the State is likewise clear and undisputed.

The Supreme Court of Iowa denied to petitioner the relief sought on the ground that the county auditor of Polk County, while a duly elected public official, acting in pursuance of the duties enjoined upon him by the statutes of the State, was a mere usurper of authority. We think we have demonstrated that this claim is untenable. Relief was likewise denied to petitioner, because, while it was shown that a gross discrimination prohibited by the laws and Constitution of the United States occurred during all of the four years, petitioner did not show that the taxing officers had no intention of removing such discrimination at some time in the future. This pronouncement of the Supreme Court seems little short of absurd in view of the fact that nearly ten years had elapsed since the taxes became payable, and there was neither pleading nor proof that the taxing officers intend to even attempt the collection of further taxes upon the great mass of competing moneyed capital, which has escaped more than 80 per cent of the taxes which it should have borne during the years involved.

The taxes upon the shares of petitioner were exacted by compulsion in violation of the Fourteenth Amendment to the Constitution of the United States. The majority opinion of the court below in denying to petitioner a refund of the grossly discriminatory taxes thus illegally exacted of it is, as we have seen based upon wholly untenable grounds. We submit that petitioner has shown that it is entitled to a refund of all taxes upon its shares of stock during the years 1919 to 1922 inclusive, in excess of five mills upon the dollar, and that the majority opinion of the Iowa Supreme Court denying such refund is in conflict with the decisions of this Court and denies petitioner rights guaranteed it by the Constitution of the United States. It follows that the case should be reversed, with directions to the Supreme Court of Iowa to enter such order or decree as may secure to petitioner the Federal rights to which it is entitled.

Respectfully submitted,

J. G. GAMBLE,

A. B. HOWLAND,

Counsel for Petitioner.

APPENDIX.

The following are the statutes of Iowa so far as material to this appeal, involving the procedure as to the assessment and collection of taxes.

SECTION 1310, 1913 SUPPLEMENT.

MONEYS—CREDITS—ANNUITIES—BANK NOTES—STOCK.—Moneys, credits and corporation shares or stocks, except as otherwise provided, cash, circulating notes of national banking associations, and United States legal tender notes, and other notes, and certificates of the United States payable on demand, and circulating or intended to circulate as currency, notes, including those secured by mortgage, accounts, contracts for cash or labor, bills of exchange, judgments, choses in action, liens of any kind, securities, debentures, bonds other than those of the United States, annuities, and corporation shares or stocks not otherwise taxed in kind, shall be assessed, and, excepting shares of stock of national, state and savings banks and loan and trust companies, and moneyed capital as hereinafter defined, shall be taxed upon the uniform basis throughout the state of five mills on the dollar of actual valuation, same to be assessed and collected where the owner resides. The millage tax here provided for shall be in lieu of all other taxes upon moneys and credits and shall be levied by the board of supervisors, placed upon the tax list and collected by the county treasurer, and the amount collected in the various taxing districts of the state shall be divided between the various funds upon the same *pro rata* basis as other taxes collected in such taxing district are apportioned. All moneyed capital within the meaning of section fifty-two hundred nineteen of the revised statutes of the United States shall be listed and assessed against the owner

thereof at his place of business, and if a corporation at its principal place of business, at the same rate as state, savings, national bank and loan and trust company stock is taxed, in the same taxing district, and at the actual value of the moneyed capital so invested. The person or corporation using moneyed capital in competition with bank capital shall furnish the assessor upon demand a full and complete itemized sworn statement showing the amount of moneyed capital so used.

SECTION 1322, 1913 SUPPLEMENT.

NATIONAL, STATE AND SAVINGS BANKS—REFUSAL TO COMPLY WITH STATUTE—PENALTY.—Section thirteen hundred twenty-two of the supplement to the code, 1907, is hereby repealed and the following enacted in lieu thereof:

"Shares of stock of national banks and state and savings banks, and loan and trust companies, located in this state, shall be assessed to the individual stockholders at the place where the bank or loan and trust company is located. At the time the assessment is made the officers of national banks and state and savings banks and loan and trust companies shall furnish the assessor with lists of all the stockholders and the number of shares owned by each, and the assessor shall list to each stockholder under the head of corporation stock the total value of such shares. To aid the assessor in fixing the value of such shares, the said corporation shall furnish him a verified statement of all the matter provided in section thirteen hundred twenty-one of the supplement to the code, 1907, which shall also show separately the amount of the capital stock and the surplus and undivided earnings, and the assessor from such statement shall fix the value of such stock based upon the capital, surplus, and undivided earnings. In arriving at the total value of the shares of stock of such corporations, the amount of their capital actually in-

vested in real estate owned by them and in the shares of stock of corporations owning only the real estate (inclusive of leasehold interests, if any,) on or in which the bank or trust company is located, shall be deducted from the real value of such shares, and such real estate shall be assessed as other real estate, and the property of such corporation shall not be otherwise assessed. A refusal to furnish the assessor with the list of stockholders and the information required under this section shall be deemed a misdemeanor and any bank or officer thereof so refusing shall be punished by a fine not exceeding five hundred dollars."

SECTION 1322-1a, 1913 SUPPLEMENT.

BANK STOCKS—MONEYED CAPITAL—TAXABLE VALUE.—For the purpose of placing the taxation of bank and loan and trust company stock and moneyed capital as nearly as possible upon a taxable value relatively equal to the taxable value at which other property is now actually assessed throughout the state as compared with the actual value thereof, it is hereby provided that state, savings and national bank stock and loan and trust company stock and moneyed capital shall be assessed and taxed upon the taxable value of twenty per cent of the actual value thereof, determined as herein provided, which twenty per cent of the actual value shall be taken and considered as the taxable value and shall be taxed as other property in such taxing district.

CODE SUPPLEMENT OF 1913—SECTION 1373:

"Complaint to board of review—appeal. Any person aggrieved by the action of the assessor in assessing his property may make oral or written complaint thereof to the board of review, which shall consist simply of a statement of the errors complained of, with such facts as may lead to their correction, and any person

whose assessment has been raised or whose property has been added to the assessment rolls, as provided in the preceding section, shall make such complaint before the meeting of the board for final action with reference thereto, as provided in said section, and appeals may be taken from the action of the board with reference to such complaints to the district court of the county in which such board holds its sessions, within twenty days after its adjournment. Appeals shall be taken by a written notice to that effect to the chairman or presiding officer of the reviewing board, and served as an original notice. The court shall hear the appeal in equity and determine anew all questions arising before the board which relate to the liability of the property to assessment or the amount thereof, and its decision shall be certified by the clerk of the court to the county auditor, who shall correct the assessment books in his office accordingly. Any officer of a county, city, town, township or school district interested or a taxpayer thereof may in like manner make complaint before said board of review in respect to the assessment of any property in the township, city or town and an appeal from the action of the board of review in fixing the amount of assessment on any property concerning which such complaint is made, may be taken by any of such aforementioned officers. Such appeal is in addition to the appeal allowed to the person whose property is assessed and shall be taken in the name of the county, city, town, township or school district interested and tried in the same manner, except that the notice of appeal shall also be served upon the owner of the property concerning which the complaint is made and affected thereby or person required to return said property for assessment. Upon trial of any appeal from the action of the board of review fixing the amount of assessment upon any property concerning which complaint is made, the court may increase, decrease or affirm the amount of the assessment appealed from. (32 G. A. ch. 60, Sec. 1; 18 G. A. ch. 109, Sec. 1; C. '73, Sec. 831; R. Sec. 740.)"

SECTION 1383, 1913 SUPPLEMENT.

TAX LIST.—All taxes, except road taxes, which are uniform throughout any township or school district shall be formed into a single tax, and entered upon the tax list in a single column, to be known as a consolidated tax, and each receipt shall show the percentage levied for each separate fund. Before the first day of January in each year, the county auditor shall transcribe the assessments of the several townships, towns or cities into a book, to be provided at the expense of the county for that purpose, to be known as the tax list, properly ruled and headed, with distinct columns, in which shall be entered the names of taxpayers, descriptions of lands, number of acres and value, number of town lots and value, value of personal property and each description of tax, with a column for polls and one for payments, and shall complete the same by carrying out the totals and footings of columns. At the end of the list of each township, town or city he shall make an abstract thereof, and apportion the consolidated tax among the respective funds to which it belongs, according to the number of mills levied for each.

SECTION 1385-B, 1913 SUPPLEMENT.

ERRORS CORRECTED—OMITTED PROPERTY.—The auditor may correct any error in the assessment or tax list, and may assess and list for taxation any omitted property; but before assessing and listing for taxation any omitted property he shall notify by registered letter the person, firm, corporation, or administrator, or other person in whose name the property is taxed, to appear before him at his office within ten days from the time of said notice and show cause, if any there be, why such correction or assessment should not be made, and should such party feel aggrieved at the ac-

tion of said auditor he shall have the right of appeal therefrom to the district court. And if such correction or assessment is made after the books have passed into the hands of the treasurer he shall be charged or credited therefor as the case may be. All expense incurred in the making of said correction or assessment shall be borne *pro rata* by the funds which are affected by said correction and the proceedings to be reported to the board of supervisors.

CODE OF IOWA, 1897, SEC. 1387.

TAX LIST DELIVERED.—He (County Auditor) shall make an entry upon the tax list showing what it is, for what county and year, and deliver it to the county treasurer on or before the thirty-first day of December, taking his receipt therefor; and such list shall be a sufficient authority for the treasurer to collect the taxes therein levied. But no informality therein, and no delay in delivering the same after the time above specified, shall affect the validity of any taxes, sales, or other proceedings for the collection of such taxes.

CODE OF IOWA, 1897, SEC. 1390.

TREASURER TO COLLECT.—The treasurer, after making the entry, shall proceed to collect the taxes, and the list shall be his authority and justification against any illegality in the proceedings prior to receiving the list; and he is also authorized and required to collect, as far as practicable, the taxes remaining unpaid on the tax books of previous years.

CODE OF IOWA, 1897, SEC. 1396.

INFORMATION AS TO TAXES DUE.—The treasurer, when applied to by letter and receiving thirty cents in postage stamps or money, and ten cents additional for each tract of one

hundred and sixty acres in excess of three hundred and twenty acres, in no case to exceed fifty cents, shall correctly answer the same by mail, giving the amount and interest of unpaid taxes and of any tax sales thereof as the same appear upon the tax list in his office, and upon the return of the letter or a copy, before the last day of the current month, with the demand due as shown therein, he shall pay the taxes and forward to the sender a tax receipt without further charge.

CODE OF IOWA, 1897, SEC. 1397.

PENALTY.—Any treasurer who shall neglect for twenty days after the receipt of any such letter, with money or stamps inclosed as aforesaid, to answer the same fully as required in the preceding section, or who shall directly or indirectly receive or be concerned in receiving any greater compensation for the service mentioned than as above provided, shall forfeit to the person aggrieved, for each offense, the sum of fifty dollars, which may be recovered in a civil action.

CODE OF IOWA, 1897.
(Code of 1927, Sec. 7235.)

SECTION 1417. REFUNDING ERRONEOUS TAX.—The board of supervisors shall direct the treasurer to refund to the taxpayer any tax or portion thereof found to have been erroneously or illegally exacted or paid, with all interest and costs actually paid thereon. In case any real estate subject to taxation shall be sold for the payment of such erroneous tax, interest or costs, the error or irregularity in the tax may be corrected at any time provided in this chapter but such correction shall not affect the validity of the sale or the right or title conveyed by a treasurer's deed, if the

property was subject to taxation for any of the purposes for which any portion of the taxes for which the land was sold was levied, and the taxes were not paid before the sale, or the property redeemed from sale.

(LAWS OF THE THIRTY-SEVENTH GENERAL ASSEMBLY.)

CHAPTER 343.

TAXATION.

SECTION 1. Rate of taxation—adjusted taxable value. That hereafter in all taxing districts in the state, including townships, school districts, cities, towns and counties, when by law then existing the people are authorized to determine by vote, or officers are authorized to estimate or determine, a rate of taxation required for any public purpose, such rate shall in all cases be estimated and based upon the adjusted taxable valuation of such taxing district for the preceding calendar year.

SECTION 2. Amounts certified in dollars, not by rate. That when any authorized tax rate within any taxing district of the state, including townships, school districts, cities, towns and counties, shall have been thus determined as provided by law, the officer or officers charged with the duty of certifying said authorized rate to the county auditor or board of supervisors, shall, before certifying the same, compute upon the adjusted taxable valuation of such taxing district for the preceding calendar year (not including moneys and credits and other moneyed capital taxed at a flat rate, as provided in section thirteen hundred ten (1310) supplement to the code, 1913), the amount of tax said rate will raise, stated in dollars, and shall certify said computed

amount in dollars, and not by rate, to the county auditor and board of supervisors.

SECTION 3. Computation of rate. When the valuations for the several taxing districts shall have been adjusted by the several boards, as provided by law, for the current year, the county auditor shall thereupon compute and spread upon the records such a rate, not exceeding the rate authorized by law, on said adjusted taxable valuations for the current year (not including moneys and credits and other moneyed capital, taxed at a flat rate, as provided in section thirteen hundred ten (1310), supplement to the code, 1913) as shall raise the amount required for each taxing district within the county, as theretofore determined under the provisions of this act, and no larger amount; provided, however, that if in adjusting the rate to be levied in any taxing district to conform to this act, such rate shall make necessary the levying of a fraction of a mill in excess of one-half of one-tenth of a mill, said fractional excess may be computed as one-tenth of a mill, which latter shall be the smallest required to be spread upon the tax lists for any purpose except rates applicable to state purpose, provided, however, that nothing herein shall be construed as interfering with the right of any taxing district to receive its due proportion of the taxes on moneys and credits and other moneyed capital taxed at a flat rate as provided in section thirteen hundred ten (1310), supplement to the code, 1913.

SECTION 4. Record of rates. On the determination by the auditor of the necessary rates as herein directed, it is made his duty to enter a record of such rates for each taxing district upon the permanent records of his office in a book to be kept for that purpose.

FILE COPY

FILED
OCT 5 1931
CLERK

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 16.

CENTRAL STATE BANK, *Petitioner*,

vs.

E. R. BENNETT, Chairman of the Board of Supervisors of Polk County, Iowa, et al., *Respondents*.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA.

REPLY BRIEF OF PETITIONER.

J. G. GAMBLE,
A. B. HOWLAND,
500 Bankers Trust Building,
Des Moines, Iowa,
Counsel for Petitioner.

INDEX.

Page

Summary of Reply Argument.

I. Mandamus was the exclusive remedy available to petitioner under the decisions of the Supreme Court of Iowa 2

II. Appeal from the Board of Review was a totally inadequate remedy; and in so far as the decision of the Iowa Supreme Court holds that petitioner was remitted to its remedy by appearance before and appeal from the Board of Review, the laws of Iowa as so construed deny petitioner the equal protection of the law and deprive petitioner of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States 18

III. & VI. The record discloses, and the opinion of the Iowa Supreme Court concedes, that during the years involved there were large and material amounts of moneyed capital, within the meaning of Section 5219 of the Revised Statutes of the United States, which were taxed at only five mills on the dollar, while the shares of petitioner were taxed at rates from five to seven times greater, thus clearly violating the restrictions found in the statute 18

IV. It is not necessary to establish that national banks and competing investors solicited the same customers for the same loans or investments to show a violation of the restriction contained in Section 5219. It is enough if the evidence clearly discloses that competing individuals or corporations engaged in seeking and securing in the same locality capital investments of the character in which national banks customarily deal 41

V. The shares of stock in corporations entering into substantial competition with petitioner constitute "moneyed capital" within the meaning of Section 5219, Revised Statutes. Holders of such shares are individual citizens within the meaning of the statute 42

VI. The evidence discloses that the business of making real estate mortgage loans constituted a part of the business of national banks in the City of Des Moines and in the State of Iowa. The business of making mortgage loans on real estate within the same territory is therefore competitive 37, 39

VII. The legislature of Iowa has by Section 1310 Code Supplement 1913 exercised its power of classification for purposes of taxation, and such classification is binding upon the taxing officers of the State. A deliberate, system-

atic, general, and intentional method of taxation whereby the classification made by the legislature is ignored denies both state and national banks the equal protection of the law 43

VIII. The acts of the Auditor of Polk County were the acts of the State, and the record affirmatively discloses an intentional, general, habitual, and systematic method of taxation whereby a gross discrimination against petitioner arose which violated the provisions of Section 5219, Revised Statutes, and the Fourteenth Amendment to the Constitution of the United States 45

IX. The suit of Des Moines National Bank v. Fairweather, 263 U. S. 103, was not an adjudication of the cause of action presented by this record 47

X. The taxes upon shares of petitioner were absolutely void because enacted in violation of the federal law and Constitution of the United States. When taxes are void, a taxpayer has the right to have them refunded, and the fact, if established, that the payments were voluntarily made, is immaterial 54

XI. Petitioner was not guilty of laches. The taxing authorities did not change their position in reliance upon any act of petitioner and were at all times advised that petitioner claimed the taxes were illegal and void. The action to compel a refund was instituted within the time prescribed by the laws of the state, and the equitable doctrine of laches is wholly inapplicable 47

XII. The record does not disclose any unconscionable or inequitable conduct on the part of petitioner in connection with the transactions involved which would deprive it of its legal and equitable rights. There was no duty on the part of petitioner to require a purchaser of a security to record his assignment from the bank; the equitable maxim that "he who comes into equity must come with clean hands" will not be extended to include the general moral status or conduct of petitioner 56

XIII. The taxes involved were paid by petitioner out of its own funds, and the claim for refund is therefore the property of petitioner 58

XIV. Corporations in Iowa are taxed upon the net amount of capital invested in the business; and under the moneys and credits statute good faith debts may be deducted from the assessment of individual taxpayers. Deposit liabilities of petitioner constitute a debt 62

XV. The Iowa statute of limitations on actions of this character is five years from the date of payment of the taxes ____ 63

XVI. The record shows the character of the business carried on by petitioner as of the date of assessment and the date of payment of the taxes herein involved. No further showing was necessary. ____ 64

XVII. & XVIII. The judgment of the Iowa Supreme Court became a finality before the writ was applied for in this Court. Petitioner was not required to file a petition for rehearing after the Supreme Court of Iowa entered a final judgment disposing of the case ____ 64

INDEX TO CASES CITED.

	Page
Alt v. Young, 181 Iowa 1260	50
Atkins v. Anderson, 63 Iowa 739	53
Barney v. New York, 193 U. S. 430	45
Brown v. Holden, 120 Iowa 191	53
Campbell v. County of Polk, 2 Iowa 467	7
Carpenter v. Shaw, 280 U. S. 363	56
Clark v. Board of Directors, 24 Iowa 266	11
Collins v. Board, 158 Iowa 322	12
Commercial Nat. Bank of Miles City v. Custer County, 275 U. S. 502	41
Cromwell v. County of Sac, 94 U. S. 351	48
Cummings v. Merchants Nat. Bank of Toledo, 101 U. S. 153	46
Commercial Nat. Bank v. Board of Supervisors, 168 Iowa 501	10, 16, 55
Des Moines National Bank v. Fairweather, 263 U. S. 103	48
Dickey v. County of Polk, 58 Iowa 287	54, 55
Evansville Nat. Bank v. Britton, Treasurer, 105 U. S. 322	43
First Nat. Bank of Guthrie Center v. Anderson, 269 U. S. 341	2, 37, 42
First Nat. Bank of Hartford v. Hartford, 273 U. S. 548	30, 37, 39, 40, 41, 42
First Nat. Bank v. Anderson, 196 Iowa 587	37, 41
Farmers Ins. Co. v. Linn County, 202 Iowa 444	53
Hawkeye Co. v. Marion, 110 Iowa 468	55
Home Tel. & Tel. Co. v. Los Angeles, 227 U. S. 278	45
Hospers v. Wyatt, 63 Iowa 264	7
Interstate Com. Com. v. Waste Merchants Assn. of New York, 260 U. S. 32	5
Iowa Railway Land Company v. Woodbury County, 64 Iowa 212	15
Lowman v. Des Moines County, 29 Iowa 310	55
Littell v. Webster County, 152 Iowa 206	12
Merchants Nat. Bank v. Richmond, 256 U. S. 635	30, 41, 43
Mercantile Nat. Bank v. Mayor of New York, 121 U. S. 138	31, 33, 43

Minnesota v. First Nat. Bank of St. Paul, 273 U. S. 561 ..... 35, 40
Montana Nat. Bank v. Yellowstone County, 276 U. S. 499 41
Munn v. Des Moines National Bank, 18 Fed. (2d) 269 ..... 29, 39, 50
Nesbit v. Independent District of Riverside, 144 U. S. 610 50
Newberry v. Newberry, 114 Iowa 704 53
Preston v. Board of Education, 124 Iowa 355 12
Rice v. Walker, 44 Iowa 458 14
Raymond v. Chicago Union Traction Co., 207 U. S. 20 ..... 45, 46
Reagan v. Farmers Loan & Trust Co., 154 U. S. 362 46
Radford v. Myers, 231 U. S. 725 50
Richards v. Wapello County, 48 Iowa 507 55
Security Trust and Savings Bank v. Board of Review, 189 Iowa 463 29
Southern Railway Co. v. Clift, 260 U. S. 316 66
State v. Cahill, 131 Iowa 286 65
Slimmer v. Chickasaw County, 140 Iowa 448 53
Sunday Lake Iron Co. v. Wakefield, 247 U. S. 350 46
Sioux City Bridge Co v. Dakota County, 260 U. S. 441 46
Steele v. Madison County, 198 Iowa 902 8
Scripture v. Burns, 59 Iowa 70 12
Sullivan v. Robbins, 109 Iowa 235 12
Taylor v. L. & N. R. R. Co., 88 Fed. 350 46
United Shoe Machinery Co. v. United States, 258 U. S. 451 50
Ward v. Love County, 253 U. S. 17 56
Woodbury County v. Talley, 147 Iowa 498 13

INDEX TO STATUTES CITED.

Page

Code of Iowa 1927
Sec. 5123 5
Sec. 5124 6
Sec. 5130 5
Sec. 7235 ..... 6, 9, 10, 13, 14, 54
Sec. 12456 10
Sec 12880 65
Sec. 12881 65
Sec. 12882 65
Code Supplement 1913
Sec. 1310 ..... 29, 43, 44, 57
Sec. 1311 63
Code of 1897
Sec. 1417 ..... 5, 6, 9, 55
Revised Statutes of United States
Sec. 5219 ..... 11, 29, 34, 37, 41, 43, 46

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 16.

CENTRAL STATE BANK, *Petitioner*,

vs.

E. R. BENNETT, Chairman of the Board of Supervisors of Polk County, Iowa, et al., *Respondents*.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA.

REPLY BRIEF OF PETITIONER.

The brief of respondents filed herein upon the main issues involved, does not in the least purport to justify or sustain the majority opinion of the Supreme Court of Iowa in this case on the grounds upon which the majority opinion is based.

On the contrary, respondents have presented numerous propositions and contentions, all of which were presented to the court below, and all of which, with the exception of one relating to only one branch of the case, were ignored by the majority opinion, and answered and denied by the minority.

We feel, however, that we may be of aid to the Court by replying to the Propositions in the order in which they are stated in the brief of respondents.

I.

Proposition I in respondents' brief (Pages 59 to 81) is subdivided into several subjects, and we will consider them in the order stated.

As to the Claim that Mandamus was not the Proper Remedy.

Insofar as the claim of petitioner is based upon the acts of the county auditor of Polk County, Iowa, in changing the assessments of owners of shares of stock in domestic corporations, and applying thereto the five mill levy, resulting as claimed in a gross discrimination in favor of such capital, the Supreme Court of Iowa, in both the majority and the minority opinions, has treated the case as one properly the subject of an action of mandamus, which, by statute, is declared to be an action in equity.

Therefore, the case in this aspect is not one of jurisdiction, but one for consideration on its merits. And it seems to us the language employed by this Court in *First National Bank of Guthrie Center v. Anderson*, 269 U. S. 341 must necessarily conclude and dispose of this contention, for there it is said:

> "The Supreme Court of the State treated the case as cognizable in equity, and perceived no obstacle to a consideration of the merits as displayed in the petition. In this that Court was proceeding within limits where the state laws and practice were controlling, and its action is not open to revision here."

But, considering this contention of respondents aside from this rule, we can find no more convincing statement than that employed by the minority of the Supreme Court of Iowa in its decision (Record, 1369 to 1371) as follows:

"The appellees also contend that mandamus is not the proper remedy. The holdings of this court are against this contention. See *Steele v. Madison County*, 198 Iowa, 902; *Murphy v. Berry*, 200 Iowa 974; *Home Savings Bank v. Morris, et al.*, 141 Iowa 560; *Eyerly v. Jasper County*, 72 Iowa 149; *Beecher v. County of Clay*, 52 Iowa 140; *The Dubuque & Sioux City R. Company v. The Board of Supervisors*, 40 Iowa 16; *Fort Madison Security Company v. Maxwell*, 202 Iowa 1346; *Farmers Insurance Company v. Linn County*, 202 Iowa 444; *The Commercial National Bank of Council Bluffs v. Board of Supervisors*, 168 Iowa 501; See also Section 1417 of the 1897 Code (now Section 7235, Code of 1927), which is the statutory authority under which the appellants bring this action. It provides:

> 'The Board of supervisors shall direct the treasurer to refund to the taxpayer any tax or portion thereof found to have been erroneously or illegally exacted or paid, with all interest and costs actually paid thereon'.

It must be borne in mind that under Section 5219 of the Revised Statutes of the United States, the taxation of National Banks shall not be at a greater rate than upon other moneyed capital. If the shares of stock in the alleged competitive institutions is moneyed capital within the meaning of the law, then the action of the county auditor in changing the assessment of their stock from personal property—from 'corporate stock'—to 'moneys and credits' under the five mill statute, and leaving the appellants' assessments on 'corporate stock' at the consolidated levy rate, compels the appellants to pay at a greater rate than, and from five to seven times as much as the competitive institutions, and thereby makes the tax which the appellants were compelled to pay an illegal tax—in contravention of the provisions of Section 5219 of the Revised Statutes of the United States; and when the appellants were compelled to pay said amount, it was illegally and erroneously exacted. In *Commercial National Bank v. Board of Supervisors*, 168 Iowa 501, we declared:

'Such an order (to refund) is essential to repayment by the treasurer and to enter it, in a proper case, is the mandatory duty of the board of supervisors.'

In *Home Savings Bank v. Morris,* 141 Iowa 560, we find the following pronouncement:

'It seems to us that the statute (Section 1417 of the Code of 1897) itself fully answers the appellants' contention. It says in so many words just what shall be done. It says that the treasurer shall be directed to refund the tax illegally paid,' etc.

In the recent case of *Steele v. Madison County,* 198 Iowa 902, an action at law was brought by a National Bank to recover from the County taxes alleged to have been illegally exacted, because of a violation of the restriction contained in Section 5219 of the Revised Statutes. We there said:

"* * * that if the board of supervisors refuse to do its duty and order a refund of the portion of the taxes erroneously or illegally exacted, an action in mandamus will lie to compel such refund.' (Citing numerous cases.)

Indeed, if the taxing authorities, through the action of the county auditor, so fixed matters that, in contravention of the provisions of Section 5219 Revised Statutes of the United States, an amount has been exacted in taxes upon the shares of stock of the National Banks at a greater rate than upon the shares of stock of the alleged competitive institutions, and are not now entitled to a remedy in mandamus to put them on equality with the competitive institutions, which have paid their taxes based on a lesser rate, the appellants would be remediless. See, as bearing on this proposition, *Greene v. Louisville & I. Railroad Co.* (U. S.) 61 L. Ed. 1280; *Sioux City Bridge Company v. Dakota County* (U. S.) 67 L. Ed. 340."

As to the Claim that Petitioner Sought to Use the Writ of Mandamus as a Means of Appeal or as a Writ of Error.

Petitioner sought by this action to enforce a right expressly declared by statute (Section 1417, Code of Iowa, 1897, as amended) by employing the means, viz., a statutory action of mandamus, declared to be the exclusive remedy by the Supreme Court of the State of Iowa. *Steele v. Madison County*, 198 Iowa 902, and cases hereinbefore cited. Therefore, we do not have a case involving the extraordinary common law remedy of mandamus, and the quotations as well as the cited case of *Interstate Commerce Commission v. Merchants Association of New York*, 260 U. S. 32, have no application.

As to the Claim that Petitioner Sought to Attack the Decision of the Board of Supervisors in a Collateral Manner.

This contention is necessarily predicated upon the premise that the board of supervisors acted in a judicial capacity. This assumption is necessarily erroneous, because in acting upon claims for the refund of taxes the board of supervisors acts purely in an administrative capacity as an auditing board, and not judicially. The board of supervisors is by statute made the administrative body, charged with the management of the business and governmental affairs of the county. Among the general powers conferred upon the Board by statute, is the power "to examine and settle all accounts, all receipts and expenditures of the county, and to examine, settle, and allow all claims against the county, unless otherwise provided by law". (Section 5130, Code of Iowa, 1927.)

Section 5123 provides as follows:

"Claims generally. Claims filed shall be numbered consecutively in the order of filing, and shall be entered

on the claim register alphabetically, so as to show the date of filing, the number of the claim and its general nature, the name of the claimant and the action of the board thereon, stating, if allowed, the fund upon which allowance is made. A record of the allowance of claims at each session of the board shall be entered on the minute book by reference to the numbers of the claims as entered in the claim register."

Section 5124 is as follows:

"Unliquidated claims. All unliquidated claims against counties and all claims for fees or compensation except salaries fixed by statute, shall, before being audited or paid, be so itemized as to clearly show the basis of any such claim and whether for property sold or furnished the county, or for services rendered it, or upon some other account, and shall be duly verified by the affidavit of the claimant, filed with the county auditor for presentation to the board of supervisors; and no action shall be brought against any county upon any such claim until the same has been so filed and payment thereof refused or neglected."

Section 7235 previously Section 1417 Code of 1897 does not appear in the chapter relating to the duties of the Board of Supervisors, but is found in the chapter relating to the collection of taxes. It provides simply that the Board shall direct the treasurer to refund any tax or portion thereof found to have been erroneously, or illegally exacted or paid. No method of procedure in connection with claims for refunds of taxes, as distinguished from other classes of claims filed with the Board, is provided by statute. Sections 5123 and 5124 clearly contemplate that the Board of Supervisors shall not act in a judicial capacity in allowing or disallowing claims, for it is expressly provided that suit may be brought on unliquidated claims after presentation thereof to the Board.

Nor do we find anything in Section 7235 which indicates an intention on the part of the legislature that in passing on claims for refunds of illegal taxes, the Board is vested with

jurisdiction to determine the legality or illegality of the taxes.

The Iowa Supreme Court has on several occasions rejected the very theory now advanced by counsel for the respondents. The early case of *Campbell v. County of Polk*, 3 Iowa 467, arose when the management of county affairs was vested in an officer known as the county judge. The county judge was also given probate jurisdiction, performed many of the functions now vested in the clerk of the District Court, and was the managing officer charged with the administration of county affairs. The county had occasion to purchase a tract of land. Certain commissioners had negotiated the terms of the purchase and had paid a portion of the purchase price. By mistake, the county judge issued warrants in payment of the full purchase price. An action was brought against the county on these warrants, and the county set up in defense that the warrants were without consideration, and issued through mistake. The trial court sustained a demurrer to this answer on the ground that in issuing the warrants, the county judge acted in a judicial capacity, and that his determination that the warrants should be issued was not subject to a collateral attack. The Supreme Court reversed the case holding that, while the county judge exercised many judicial functions, in allowing or rejecting claims against the county, and in issuing warrants, he acted in a purely ministerial capacity, and that his action was open to review at any time.

The leading case in Iowa is that of *Hospers v. Wyatt*, 63 Iowa 264. It there appeared that two men named Ross and Bell had paid the taxes on certain tracts of land for the years from 1866 to 1880 inclusive. It later developed that the taxes were illegal. Ross and Bell presented a demand for refund of the taxes for the fifteen years, to the Board of Supervisors, which allowed the claim, and directed the auditor to issue a warrant, or refunding order. The plaintiff, a taxpayer, brought an injunction action against the auditor to enjoin the

issuance of any warrant covering that portion of the taxes which were barred by the statute of limitations, and certain items, which the plaintiff alleged Ross and Bell had no right to recover. The trial court enjoined the county auditor from issuing the warrants. On appeal it was contended that the Board of Supervisors in allowing the claims for refund acted in a judicial capacity, and that the propriety of the board's action could not be questioned by an injunction suit. It will thus be seen that the issue of law was the identical issue raised by counsel for the appellees in this case. In passing upon the question in an opinion by Mr. Justice Seevers, the Iowa court said:

> "It will be conceded, if the board acted judicially, that injunction is not the proper remedy. That the board of supervisors, in relation to many matters, act judicially, will also be conceded; but that they do so in the allowance of claims against the county cannot, we think, be the rule. If this is so, then the determination of the board, while it may not have the force and effect of a judgment in so far as relates to its enforcement, must of necessity be final and conclusive as an adjudication, so far as the amount allowed is concerned, if the same is not annulled or set aside in some direct proceeding, such as an appeal or certiorari. It has been held that the allowance of a claim by a city or school district by the proper auditing board thereof, and a warrant issued therefor on the treasurer, is not final and conclusive as an adjudication, but that, in an action brought on such warrant, the city or school district may plead and establish that the allowance of the claim was illegal and not authorized by law. *Clark v. The City of Des Moines*, 19 Iowa, 199; *Eastman, Bovee & Co., v. The Dist. Twp. of Lyon*, 40 Id. 438.
>
> In *Campbell v. Polk County*, 3 Iowa, 467, which was an action brought on county warrants, it was pleaded as a defense that they were issued without consideration and through mistake. To this defense a demurrer was filed, on the ground that, when the county judge had once passed upon a matter within his jurisdiction, that action was final, unless appealed from or impeached for fraud.

The demurrer, it was held, had been erroneously sustained. And the reasoning of the court in determining the question before it favors strongly, to say the least, the position that the acts of the county judge in allowing a claim against the county was not a judicial act, except that an appeal was allowed therefrom, and to that extent it must be so regarded.

The powers of the board of supervisors in relation to the allowance of claims against the county are not greater than those of the county judge; (Code of 1851, Sec. 106;), and therefore, the same rule must prevail. If the allowance of the claim constitutes an adjudication and judgment, it must, as has been said, have the force and effect of a judgment, so as to preclude all inquiry as to its correctness. The warrant issued thereon, should, if the judgment is conclusive, have the force and effect of an execution; but we have seen that this is not so. Now, if the warrant can be impeached for illegality, as not authorized by law, it seems to us that it necessarily follows that the allowance of the claim may be impeached in like manner, and for the same causes."

The foregoing authorities amply demonstrate that in allowing or rejecting claims for refunds of taxes under Section 7235, the Board of Supervisors act in a purely administrative capacity and do not exercise judicial functions.

As to the Claim that Petitioner Cannot Maintain This Action Because the Proper Parties are not Before the Court.

This contention is based upon the claim that the State of Iowa, Polk County, City of Des Moines, and the Independent School District of Des Moines, are affected by the result, and are not as such made parties to the action.

The contention overlooks the provisions of Section 1417, of the Code of Iowa, 1897, which was in force at the times involved herein, (now Section 7235, Code of Iowa, 1927), which requires the board of supervisors to direct the treasurer to refund to the taxpayer any tax or portion thereof found

to have been erroneously or illegally exacted or paid, with interest and costs actually paid thereon; and also the fact that the Supreme Court of Iowa has declared the sole and exclusive remedy to be by mandamus upon the officers named in this statute.

As to the Claim that Petitioner's Remedy, if any, is at Law.

This contention is based upon the claim that only an action in certiorari may be maintained. This claim is not sustained by, and is contrary to, the decisions of the Supreme Court of Iowa hereinbefore referred to.

The writ of certiorari can only be used to review the proceedings of an inferior board or body exercising judicial functions.

Code of Iowa, 1927, Section 12456, provides:

> "The writ of certiorari may be granted when authorized by law, and in all cases where an inferior tribunal, board, or officer *exercising judicial functions is alleged to have exceeded his proper jurisdiction, or is otherwise acting illegally* * * *". (Italics ours.)

Under this statute the writ of certiorari is not available to control the action of administrative bodies, and as the board of supervisors in allowing or disallowing claims for refund under this statute do not act in a judicial capacity, there can be no remedy by way of certiorari.

No authorities dealing with the subject of tax refunds are cited by counsel for the respondents in support of their contention, except the case of *Commercial National Bank vs. Board of Supervisors*, 168 Iowa, 501. This case squarely holds that Sec. 7235 imposes a mandatory duty upon the Board of Supervisors to make refunds of taxes illegally exacted. The facts of that case were that the Commercial National Bank of Council Bluffs filed with the Board of Super-

visors of Pottawattamie County a claim for a refund of taxes exacted upon the shares of a National Bank, under a statute subsequently declared invalid, because in violation of Section 5219 of the Revised Statutes of the United States. The Board of Supervisors denied the refund and the Bank sued in mandamus. The Iowa Court held that mandamus was the proper remedy, that the Board acted in a purely ministerial capacity, and that it was the mandatory duty of the Board to make the refund sought. We quote the following from the opinion in that case:

> "II. The duty of the board of supervisors is equally explicit. Having ascertained that the taxes have been illegally or erroneously exacted or paid, the statute prescribes precisely what shall be done, i. e., the board shall direct the treasurer to refund them to the taxpayer. Such an order is essential to repayment by the treasurer and to enter it, in a proper case, is the mandatory duty of the board of supervisors. That there is no adequate remedy at law sufficiently appears from the cases cited and as the contention is that the board of supervisors omitted a duty the performance of which the law enjoins, mandamus is the proper remedy. Section 4341, *et seq.*, Code; *Eyerly v. Jasper Co., supra;* See *Beecher v. County of Clay*, 52 Iowa 140; *The Dubuque & S. C. Ry. Co. v. Board of Supervisors*, 40 Iowa 16."

We submit that the case supports the contention of the petitioner and is not available to the respondents as an authority.

The next case cited is that of *Clark v. Board of Directors*, 24 Iowa 266. In this case a writ of mandamus was issued by the trial court ordering the defendants to enroll the plaintiff in a particular public school in the district in which she resided. Plaintiff was a colored child who had been denied admission to a particular school, because of an attempt on the part of the Board to establish a school for colored children exclusively. The court says that it was the mandatory duty

of the board of directors to permit the plaintiff to attend the school in the district wherein she resided, and that no discretion was vested in the Board with reference to the segregation of races in the public schools. The case does not support the contention of the respondents.

In *Preston v. Board of Education*, 124 Iowa, 355, it appeared that the Board of Directors of an independent school district had denied the plaintiff the right to attend the school without payment of tuition on the ground that she was a non resident of the district. The defendants demurred to the petition because the Board were vested with power to determine the residence of the plaintiff as a fact question, and on the further ground that the plaintiff had an adequate remedy at law by way of appeal to the county superintendent of schools from the decision of the board of directors. It was held that the decision of the board could not be reviewed in an action in mandamus, and the opinion concludes as follows:

> "Conceding now, that the Board reached an erroneous conclusion, it is clear that the remedy was by review of the facts and the judgment predicated thereon. This the law provides for in the way of an appeal to the county superintendent of schools."

Of course where there is an adequate remedy by way of appeal from the decision of an inferior tribunal, the remedy in mandamus will not lie, and as there was a right of appeal to the County Superintendent of School to correct the erroneous decision of the Board of Directors the remedy of mandamus was not available to plaintiff.

The cases of *Scripture v. Burns*, 59 Iowa, 70, *Sullivan v. Robbins*, 109 Iowa, 235, *Littell v. Webster County*, 152 Iowa, 206, and *Collins v. Board*, 158 Iowa, 322, are cited by counsel for the respondents in support of their contention that the instant case constitutes a collateral attack upon a judgment of the Board of Supervisors. None of these cases support the

argument of counsel. They are merely cases in which the Boards acted in an administrative capacity but were vested with a discretion as to the performance or non-performance of certain acts. Thus in *Littell v. Webster County, supra,* it is held that mandamus will not lie to compel the engineer and Board of Supervisors to accept an improvement under a drainage contract. These cases have no bearing upon the question before the Court for decision.

The case of *Woodbury County v. Talley,* 147 Iowa, 498, is apparently strongly relied upon by counsel for respondents. The facts in that case were that the Sioux City Stock Yards Company had been assessed as a merchant and no assessment had been returned against the stockholders of the corporation upon their shares of stock. The real estate was separately taxed. A tax ferret, employed to discover omitted property, requested the treasurer to make and enter an assessment upon the shares as omitted property. The treasurer after notice to the corporation held a hearing and entered his decision in writing, stating that he was without authority to make an assessment upon the shares as omitted property. The Iowa Supreme Court held that mandamus was not available to review the determination of the County Treasurer, as he acted in a purely judicial capacity, and was clothed with the power of deciding whether the property was omitted property, and whether it was properly subject to assessment and taxation. As the treasurer was acting judicially, and had authority to determine the question in the first instance, mandamus would not lie to control the exercise of that jurisdiction. The case is clearly distinguishable from the case at bar because in passing upon claims for refunds of taxes under Section 7235 the Board of Supervisors acted as an administrative auditing board, not as a judicial tribunal, clothed with the authority of determining the legality or illegality of the taxes.

A claim for refund of taxes is a claim upon the tax funds, and as the County Treasurer is the officer collecting

taxes, and as they are disbursed by him under the order of the Board of Supervisors, the statute requires that the claim be made to the Board, but that does not mean that in allowing or rejecting the claim the Board acts judicially. They act in the same capacity in allowing or rejecting a claim under Section 7235 as in allowing or rejecting any other claim against the various county funds.

As to the Claim that Mandamus Will Not Lie to Compel the Payment of Money by Public Officers if There Is No Fund Out of Which It Can Legally be Paid.

In support of their contentions, counsel cite two Iowa cases. The first is that of *Rice v. Walker*, 44 Iowa, 458, which states the rule that an officer will not be required by writ of mandamus to do that which it is impossible for him to do, even though he has put it beyond his power by his own action. The facts of that case were briefly as follows: The plaintiff procured a judgment for personal injuries against the City of Des Moines. In the years 1874 and 1875 the city levied a tax of eight mills for a judgment fund, and realized therefrom for the year 1874 $31,941.00, and at the time of the trial had not yet collected the money for the taxes of the year 1875. The City Council had diverted about $10,000 from the judgment fund to pay interest on bonds, and $17,000 had been transferred therefrom to the general fund of the city, and largely exhausted in payment of general expenses. The trial court awarded a peremptory writ of mandamus directing the defendant as treasurer of the City of Des Moines to forthwith pay the plaintiff's judgment. It was held that a writ of *mandamus* should not be issued against a public officer to compel the performance of an act which had become impossible. We quote the following from the opinion of the court:

"The judgment of the Circuit Court should be so modified that a writ of mandamus issue, commanding the defendant to pay to plaintiff his said judgment with interest and costs, so far as he may be able to do so with funds in the city treasury collected either from the tax of 1874, levied 'for judgment fund,' or from the tax of 1875, levied 'for city judgment tax,' whether the same may have been transferred or credited to any other fund or not.

The injunction restraining the diversion of said taxes was properly granted."

The foregoing recital shows that the facts were not comparable to those presented by this record, and the conclusion of the court supports our contentions rather than those of counsel for respondents. The case of *Iowa Railway Land Co. v. Woodbury County*, 64 Iowa 212 is equally inapplicable to the present controversy. That was an action at law against a county to recover taxes illegally exacted. It affirmatively appeared that a large portion of the taxes had been distributed to the various governmental sub-divisions. The court says:

"It is the tax which has been illegally or erroneously exacted which is to be refunded. The clear meaning of this is that the money which is to be returned to the tax payer is to be taken from the particular fund or funds into which the illegal tax went when it was collected. The section clearly does not impose on the county the burthen of paying any portion of such taxes out of its general funds, except the amount thereof which has gone into that fund. The county is not made liable for any portion of the tax illegally or erroneously collected, except the amount which is collected for its use. But the duty imposed on the board of supervisors is to order the treasurer to refund to the tax payer, from each of the separate funds for the benefit of which the tax was collected, the amount thereof which is found to have been illegally or erroneously exacted from him. And any judgment rendered against the county on account of the collection of such tax should be satisfied by moneys

taken in proper proportion from the several funds into which the tax went when collected."

It is quite apparent from this opinion that the case supports our contentions rather than those of respondents. It specifically holds that mandamus is the proper remedy to compel refunds of taxes illegally exacted, and that such remedy is exclusive when the taxes have been distributed to the various governmental sub-divisions. It is quite apparent that these authorities do not sustain the contention of counsel that proof of the existence of a fund sufficient to satisfy the claim is necessary in a mandamus action. There are some cases to which the rule stated by counsel might be applicable. Thus, if in this case petitioner were demanding the issuance of writs of mandamus compelling the County Treasurer to forthwith pay certain claims or warrants, the rule would apply. In this case petitioner does not seek a writ commanding the respondents to pay the refunds. The petitioner prays that a writ issue compelling the Supervisors to order the payment, or to direct the auditor to draw a warrant on the treasurer for the proper amount. If the warrant or order is issued petitioner may then be faced with the necessity of invoking the remedy of mandamus to compel the levy of a tax to pay the warrants or orders. But that question is not now involved.

It was the intention of the legislature that the Board of Supervisors should order refunds under this section, to be made from the several funds to which the taxes were originally distributed, and the fact that distribution may have been made of the tax money originally paid does not in any sense affect the right of the taxpayer to have the same repaid from such funds. The opinion of Justice Ladd in *Commercial National Bank v. Board of Supervisors*, 168 Iowa 501 clearly shows this intention. We quote the following from the opinion:

"The manifest design of this statute is that the board of supervisors first ascertain whether the taxpayer is entitled to be reimbursed for taxes illegally or erroneously exacted and if so, that the treasurer be directed to repay the same from the several funds to which these have passed. Such was the interpretation given in *Iowa Ry. Land Co. v. Woodbury Co.*, 64 Iowa 212, where recovery against the county was denied, and this decision was followed in *Eyerly v. Jasper County*, 72 Iowa 149. It is the duty of the treasurer only to repay from the particular funds into which the taxes have gone and, when necessary, to ascertain by computation the amount to be taken from each. *District Township of Spencer v. District Township of Riverton*, 56 Iowa 85. The result attained is the restoration of the moneys illegally or erroneously paid by the taxpayer, and each fund continues as though these had never been collected. The remedy is perfect."

If proof of the existence of a fund is necessary in a case of this character, the fact remains that the record contains an abundance of proof of the existence of such a fund.

The record affirmatively discloses that after the filing of the claims for refunds with the Board of Supervisors, the County Treasurer collected and remitted to the State of Iowa, to the City of Des Moines, and to the Independent School District millions of dollars, all of which might legally have been applied in payment of petitioner's claim for refunds. In the year 1926 the county treasurer remitted to the treasurer of the Independent School District of Des Moines $2,972,351.08, to the treasurer of State $408,034.21 for state general revenue and for soldiers bonus $94,069.59. The treasurer retained out of the tax moneys collected by him in 1926 for county purposes $1,333,597.28, to the Treasurer of the City of Des Moines he paid $2,724,250.82. Correspondingly large amounts were paid to the Treasurer of State, the Treasurer of the Independent School District, and the Treasurer of the City of Des Moines in the year 1927. Exhibit 1765 is a tabulation prepared by the deputy county auditor of Polk

County. It shows that in the taxing district of the City of Des Moines $424,295 would be collected for state revenue in the year 1928; $1,197,457.00 for county purposes; $2,737,872.00 for the City of Des Moines, and $3,038,901.00 for the Independent School District. We submit therefore that the evidence of the petitioner shows without dispute the existence of large sums of money in the hands of county treasurer more than sufficient to meet the claim of the petitioner.

II.

By Proposition II in respondents' brief (Pages 77 to 81) it is contended that petitioner's remedy was by appeal from the local board of review.

The Supreme Court of Iowa by both the majority and minority opinions in this case held that insofar as the assessment of moneys and credits, other than stock in domestic corporations owned by indivduals, was concerned, the petitioner was remitted for its remedy to an appeal from the local board of review. At the same time the opinion of the Supreme Court of Iowa holds that insofar as the assessment of shares of stock in domestic corporations was concerned, petitioner was not remitted to an appeal from the local board of review.

The contentions set forth in this proposition have been fully and completely answered in Subdivision VI of the brief of petitioner filed herein, and we deem it unnecessary to reiterate the argument there advanced.

III and VI.

By Propositions III and VI in respondents' brief (Pages 81 to 119) it is contended that it was not shown by the record that there was in the years involved a substantial amount of moneyed capital, within the meaning of Section 5219 of

the Revised Statutes of the United States, which was subjected to taxation at a grossly favorable and discriminatory rate.

Before proceeding to a consideration of the contentions advanced in respondents' brief, we desire to briefly correct some inaccuracies and omissions in the so-called "Statement of the Evidence" set out at pp. 16 to 42, inclusive of respondents' brief. This statement is neither fair nor complete, and in many instances distorts the actual evidence introduced. We substitute, therefore, the following brief resume of the testimony in place of that found in respondents' brief.

Security Loan & Investment Company. The secretary-treasurer of this company testified that it was engaged in the real estate loan business and handled the purchase and sale of public improvement bonds and certificates, dealt both in farm loan mortgages in central Iowa and in mortgages on residence and business properties in Des Moines, which it sold to purchasers including life insurance companies and individual investors. It purchased and sold municipal and public improvement securities, it financed public improvement contractors, making advancements of funds to enable the contractor to complete the job, and took in payment the municipal securities in which the contractor was paid. It issued debenture bonds which it sold to investors, sold real estate bond issues, and from 1919 to 1922 did a maximum business of $600,000 per year in public improvement securities. Its mortgage loan business amounted to two and one-half or three million dollars per year. The witness did not testify, as set forth on p. 16 of respondents' brief, that "The company also as a habit made loans in excess of fifty per cent of the value. One mortgage would be for the fifty per cent amount, and the second mortgage for the balance. These excesses amounted to $350,000 of the assets." The witness did testify.

"We had some second mortgages among our assets during the four-year period. When we sold the second mortgages we almost always guaranteed them. In some instances we made a loan upon property which seemed a little higher than we wanted to make as a first mortgage, and we would have one note and mortgage representing a first lien, and smaller amounts which were sold subject to the lien of the larger notes. I would say that we had a total of over $300,000 either in the hands of the Company or in the hands of our customers of that character." (R. 206) (See R. 197-215.)

Iowa Investment & Mortgage Company. The president of this corporation testified that the business carried on during the period from January 1, 1919 through 1922 was making real estate first mortgage loans on residence and business property in the city of Des Moines, with very few farm loans. The company sold its loans to investors and kept its capital and surplus invested in such securities. On January 1, 1919 it held $37,273 of mortgage loans. On p. 17 of their brief, counsel purport to quote the testimony of this witness as follows: "We did not make the loans ourselves, but they were Prudential loans made on their mortgage blanks and their notes. We simply handled them as their correspondent." This statement is inaccurate. The witness did testify:

"The Prudential Insurance Company called us correspondents. When they first started with us, we did not advance our own money on their loans, but on account of competition and the time it took for them to close loans and get the money to us, we made an arrangement with them after the loan had been approved and the abstract had been examined, by which we paid out our money and closed the loan, and sent them the papers and they remitted to us. We got the interest on the money until the loan was accepted and approved by the Prudential Company. We charged a commission for handling such loans which was paid by the borrower in each instance." (R. 222.) (See R. 218 to 224.)

Central Iowa Joint Stock Land Bank. The president of this corporation testified that it made first farm mortgage loans in Iowa as prescribed by the Federal Farm Loan Act. It issued bonds which were secured by the deposit of farm mortgages with a government registrar. On January 1, 1920, its statement to the assessor disclosed "Bills Receivable, Mortgages—$771,200". On January 1, 1921 it reported "other credits due or to become due, $1,350,235", and on January 1, 1922 reported "Bonds Outstanding, $1,520,000." (R. 220-224.)

Des Moines Morris Plan Company. The president of this company testified that its business was loaning money. It made loans with two persons as co-signers with the borrower. It purchased paper from automobile dealers secured by liens on automobiles both in Des Moines and in adjacent towns. It purchased trade acceptances from dealers in household appliances, secured by the endorsement of the dealer. It financed dealers in washing machines, vacuum cleaners, sewing machines, and similar articles. The gross volume of automobile paper handled in 1920 approximated $1,000,000 and somewhat lesser amounts in subsequent years. It rediscounted automobile paper in New York, and secured additional funds by the sale of "investment certificates" which drew interest. The volume of household appliance paper approximated $100,000 per year. (R. 248-256.)

Continental Securities Company. The president of this company testified that the business in which it was engaged was largely a first mortgage real estate loan business, making loans on city property in Des Moines and some farm loans in the immediate vicinity of Des Moines. Most loans were on improved real estate, with some loans to finance construction of homes. The company sold its mortgages to investors both locally and in different parts of the country where it had clients. The volume of mortgage loan business transacted was approximately $150,000 to $200,000 per annum. It issued

debenture bonds secured by deposit of mortgages, and purchased securities from public improvement contractors, and financed such contractors in some instances while the work progressed. (R. 257-260.)

Iowa Guarantee Mortgage Corporation. The president of this company testified that it discounted conditional sales contracts covering the sale of automobiles sold on the deferred payment plan. During 1919 and 1920 the company loaned money to dealers in automobiles, secured by warehouse receipts on cars and trust receipts for automobiles in the dealer's possession. On January 1, 1920 the company reported to the assessor "Notes, $347,000". These were automobile notes and trade acceptances. On January 1, 1921 it reported notes of $321,339 of the same character. The volume of transactions handled by this company in the four years in controversy was: 1919—$1,013,940; 1920—$1,179,032; 1921—$411,751; 1922—$606,999. It deposited these securities with the Des Moines Savings Bank & Trust Company as trustee and issued against them collateral gold notes or bonds which were sold to banks in Iowa and Illinois. (R. 261-266.)

Federal Cattle Loan Society. The testimony with respect to this company is correctly stated in respondents' brief, except with respect to Exhibit 1480 the following statement should be eliminated: "The other item, $267,453.31, is stock notes given for corporation stock." (R. 274-280.)

Garner Investment Company. The statement on pp. 24 and 25 of respondents' brief is substantially accurate. (R. 266-272.)

Jesse F. Stevenson Company. The statement on pp. 25, 26, and 27 of respondents' brief is substantially accurate, but we add thereto the following from the testimony of the president:

> "We had some cases in which customers of our institution would leave money with directions as to the

manner of its investment. In some cases the money was received in the way of advance payments for securities with deliveries to be made later. In some cases it was left with carte blanche authority. In such case the money was merged with the funds of the company, and the customer was paid interest." (R. 288.)

Farmers Bond & Mortgage Company. The president of this company testified that it was engaged in the first mortgage loan business on Iowa farm land and Des Moines property. It made farm loans in Central Iowa which it sold to investors. It issued first mortgage certificates which it sold to investors, which certificates were secured by the deposit of mortgages with a trustee. On January 1, 1922, it held mortgage loans and liberty bonds to the extent of $179,200. The statement appearing on p. 28 of respondents' brief—"When the loans were made, the company negotiated them and sold them to insurance companies mostly. Few mortgages were sold to private investors." should be eliminated, and the following substituted therefor:

"The company negotiated the loans and sold them to insurance companies, or other investors. The city mortgages were sold to individual investors largely, and the farm mortgages to insurance companies." (R. 292.)

The company did a gross volume of business in 1920 to 1922 of about two million dollars.

Motor Finance Company. The statement found in pp. 28 and 29 of respondents' brief is substantially correct. (R. 298-300.)

Union Mortgage & Cattle Loan Company. The secretary of this corporation testified that it engaged in loaning money on Iowa farm lands and making loans on cattle secured by chattel mortgages. It secured its cattle loan paper through country banks. It made some loans to individual borrowers on open notes. On January 1, 1921 it had in its bills receivable account $184,426 and in its mortgage account $1,001,-

946. It sold its securities to private investors and issued and sold some debenture bonds. The secretary testified: "The theory of our Bills Receivable account was a commercial banking business—secured by chattel mortgage sometimes and secured by endorsements." (R. 300, 318-323.)

Bond & Mortgage Company of Iowa. The auditor of this company testified that it was in the investment business, buying and selling bonds, mortgages, notes, and securities. It made first real estate mortgage loans, both farm and city, operated in the City of Des Moines and in nearby towns. It sold city loans to the Metropolitan Life Insurance Company of New York. The volume of business exceeded $400,000. The company also dealt in various types of bonds. It financed public improvement contractors, and purchased improvement bonds at a discount, and it sold these bonds. The volume of business in bonds and municipal improvement securities approximated $1,000,000. It purchased $800,000 to $900,000 of notes. It financed dealers in automobiles by the purchase of notes and contracts secured by liens on automobiles. (R. 308-309.)

Manning Martin Company. The statement on pp. 32 and 33 of respondents' brief is substantially accurate. (R. 307-309.)

Des Moines Joint Stock Land Bank. The statement on pp. 33 and 34 of respondents' brief is substantially accurate, but we add the following: On January 1, 1920 the company reported "Mortgages $1,172,399" and "Liberty Bonds $666,455". On January 1, 1922 the company had $1,600,000 outstanding in farm loan bonds and held $42,400 in Liberty Bonds. (R. 312-313.)

First and Second Mortgage Corporation. The secretary of this corporation described its business as a general investment and brokerage business in investment securities. The company bought and sold mortgage loans, acted as broker or agent in the negotiation of such loans. It did a business of

between two and three million dollars in securities during the four years 1919 to 1922 inclusive. It acted as loan agent for the Des Moines Joint Stock Land Bank, Lincoln Joint Stock Land Bank, Chicago Joint Stock Land Bank, Central Life Insurance Company of Des Moines, and Illinois Merchants Trust Company of Chicago. It dealt in government bonds and in industrial bonds to some extent. It secured an issue of bonds of the LeMars Gravel Company by trading stock subscription notes. (R. 313-317.)

Continental Mortgage & Loan Company. The statement on p. 35 of respondents' brief is substantially accurate. (R. 337-340.)

Des Moines Discount Company. The secretary-treasurer of this company testified that it bought notes, automobile contracts, and loaned money on collateral security. Most of the notes ran from six months to one year. On cross examination the witness testified that the company handled the class of business that the banks did not handle. On re-direct examination he said that the reason that such paper was not handled by banks was because the maturity was a little longer than the banks would want to handle. (R. 341-343.)

Bankers Mortgage Company. The vice-president of this company testified that it dealt in farm mortgages, municipal, public utility, and industrial bonds. The company made loans on Iowa farms direct to borrowers, with whom it got in touch through its stockholders and country bankers. It sold farm mortgage loans to insurance companies and other investors. The company bought entire issues of municipal, county, and school bonds throughout Iowa. It dealt in Liberty Bonds, railroad bonds, and foreign government bonds. It did a business of approximately $1,000,000 during the year 1919. The statement "The company got the loans the bank did not want to make." is incorrect. The vice-president of the company testified: "Some of the banks in the city were not making all of the mortgages at that time that they had a

chance to make, and we frequently got business from one or another of the banks in the city." (R. 343-347.)

United Mortgage Loan Company. The president of this company testified it made loans on real estate, both first and second mortgage, and loaned money on real estate contracts and equities. It also purchased contracts. It sold its loans to individual investors. (R. 349-353.)

Merchants Loan & Investment Company. The statement appearing at pp. 37 and 38 of respondents' brief is fairly accurate, except that the record does not contain the statement: "Stockholders in the Central State Bank, Mechanics Savings Bank, Des Moines National Bank, Central Trust Company, Valley National Bank, and Peoples Savings Bank were stockholders in the company." (R. 349-353.)

State Bond Company. The statement on p. 38 of respondents' brief is substantially accurate.

Polk County Mortgage Company. The statement on pp. 38 and 39 is substantially correct.

Guarantee Mortgage & Finance Company. The statement set out on pp. 40 and 41 of respondents' brief is substantially accurate.

National Investment and Finance Company.—Burns Bros. Company. The auditor of this company testified that the National Investment & Finance Company during 1919 made small loans to individuals, secured by stocks and bonds, and made loans to cattle feeders. It continued this business up until July 1920, when the cattle loan business was discontinued. The company purchased, sold, and held mortgage loans on farms in Iowa and a few in the Dakotas, for investment. The name of the company was changed to Burns Bros. Company in the latter part of 1921. The principal business engaged in by Burns Bros. Company was buying bonds of municipalities, selling them, making loans to individuals, making, purchasing, and selling farm mortgage loans. (R. 745.)

United Cattle Loan & Livestock Company. The assistant to the auditor of this company testified that the principal business of the company was making loans on livestock secured by chattel mortgages. The borrowers resided principally in Iowa. The loans were evidenced by notes running for not to exceed six months. The company loaned chiefly on cattle, but made a few loans on sheep. It rediscounted its paper with banks throughout the state of Iowa. Most of the loans were handled through country banks. It did a gross business of around $1,500,000 in 1920. (R. 743.)

The statements set forth on pp. 43 and 44 of respondents' brief as to the banking business of petitioner are misleading, inaccurate, and do not correctly reflect the facts disclosed by the testimony. On direct examination Grant McPherrin, petitioner's president testified that during the years 1919 to 1922 the bank made loans or extended credit to automobile dealers located in the City of Des Moines. Some of such loans were made on the open note of the dealer, and some were secured by warehouse receipts covering automobiles and trucks in transit and in storage. (R. 561-564, incl.)

The bank made loans to persons engaged in the construction of public improvements. It took agreements to purchase public improvement bonds or assessment certificates from such contractors at times, but had no transactions of that character in the years in question. (R. 564, 572-573.)

Petitioner made a large number of real estate first mortgage loans on farms and on city real estate in the City of Des Moines. It made and sold such loans to insurance companies. (R. 564.) It made loans to customers for the purpose of enabling the borrower to purchase and feed cattle. (R. 565.)

On cross examination the witness, in referring to chattel mortgages as security on such loans, made the statement re-

ferred to at R. 1176, but on redirect examination testified as to specific loans made to breeders and growers of livestock. (R. 646-648, incl.)

The statements set forth in the second paragraph at the top of p. 44 of respondents' brief are misleading and do not correctly state the Record. Petitioner made loans of less than $300 in amount during all of the years involved. In 1919, 564 such loans were made; in 1920, 464; in 1921, 642; and in 1922, 692. (R. 565.) The president of petitioner testified that it frequently made loans of $300 or less, secured solely by the signature of an endorser. The borrower might have been a man of such character that he would be required to support his borrowing power by chattel mortgage on his household furniture, but the endorser "need not" or "must not" be of that character. (R. 1176-1177.)

Petitioner sold bonds as agent for S. W. Strauss & Company in the years 1919 and 1920 on a commission basis. (R. 576.) Petitioner also bought and sold municipal bonds and liberty bonds in 1919 and 1920. (R. 565.) The S. W. Strauss bonds were secured by liens on apartment houses and hotels at different points in the United States. It handled $127,000 in such bonds in 1919, and $155,000 in 1920. (R. 566.) In 1921 petitioner purchased and sold general market bonds, including industrial, railroad, public utility, and foreign government securities, and purchased such bonds through syndicates and bond houses. (R. 566, 576.) Petitioner advertised for real estate loans, and notified its correspondents that it was in the market for good farm mortgage loans. It handled farm loans that it would not make unless it first found a purchaser for the loan, but made no city real estate loans on that basis. (R. 577.)

The last paragraph found on p. 44 of respondents' brief is inaccurate, as the Record shows that the witnesss was referring to a real estate loan for $25,000 which was evidenced by a large number of notes which were sold by petitioner

to various individual investors, all secured by one mortgage to petitioner. (See R. 762-764, incl.)

In determining the rights of petitioner, it must be borne in mind that the State of Iowa through its legislature adopted, for the purpose of taxing the shares of state banks, the identical classification made by Congress by Section 5219 of the Revised Statutes of the United States. Section 1310, Code Supplement 1913, places the shares of national banks, state banks, and trust companies, "and all other moneyed capital within the meaning of Section 5219 of the Revised Statutes of the United States" in the same classification for taxing purposes, and, under the decisions of the Supreme Court of Iowa, absolute equality as between national and state banks is required. *Security Trust & Savings Bank v. Board of Review*, 189 Iowa 463.

The adoption of this classification was tantamount to the re-enactment of Section 5219 of the Revised Statutes by the Iowa legislature, for the identical classification contained in the federal statute was adopted for the purpose of taxing the shares of state banks and loan and trust companies. The Circuit Court of Appeals for the 8th Circuit, in *Munn v. Des Moines National Bank*, 18 Fed. (2d) 269, recognized that the rights of state and national banks had been placed upon a basis of substantial equality, for, in the opinion by Circuit Judge Sanborn, it is said:

> "The nature of the cases and the issues contended and adjudged are practically identical. The constitution and statutes of Iowa protect the rights of shareholders of the other two banks to the same extent as the rights of the shareholders of the Des Moines National Bank are protected by Section 5219 of the Revised Statutes and the Constitution of the United States."

It is well settled that the term "other moneyed capital" includes investments of individuals in notes, bonds, mortgages, and other securities such as normally enter into the busi-

ness of banking, as well as shares of stock or other interests in corporations, engaged in the loan and investment business in the same field in which national banks make loans and investments.

Thus in *Merchants National Bank v. Richmond*, 256 U. S. 635, this Court said:

> "By repeated decisions of this court, dealing with the restriction here imposed, it has become established that while the words 'moneyed capital in the hands of individual citizens' do not include shares of stock in corporations that do not enter into competition with the national banks, they do include something besides shares in banking corporations and others that enter into direct competition with those banks. They include not only moneys invested in private banking, properly so called, but investments of individuals in securities that represent money at interest and other evidences of indebtedness such as normally enter into the business of banking."

In *First National Bank of Hartford v. City of Hartford*, 273 U. S. 548, Mr. Justice Stone, speaking for this Court, uses the following language:

> "Our conclusion is that Section 5219 is violated wherever capital, substantial in amount when compared with the capitalization of national banks, is employed either in a business, or by private investors in the same sort of transactions as those in which national banks engage and in the same locality in which they do business."

And from another point in the same opinion, we quote:

> "Competition may exist between other moneyed capital and capital invested in national banks, serious in character and therefore well within the purpose of Section 5219, even though the competition be with some but not all phases of the business of national banks. Section 5219 is not directed merely at discriminatory taxation which favors a competing banking business. Competition in the sense intended arises not from the character

of the business of those who compete but from the manner of the employment of the capital at their command. No decision of this court appears to have so qualified Section 5219 as to permit discrimination in taxation in favor of moneyed capital such as is here contended for. To so restrict the meaning and application of Section 5219 would defeat its purpose. It was intended to prevent the fostering of unequal competition with the business of national banks by the aid of discriminatory taxation in favor of capital invested by institutions or individuals engaged either in similar businesses or in particular operations or investments like those of national banks."

One of the leading cases on this subject is that of *Mercantile National Bank v. Mayor, etc.*, 121 U. S. 138. In that case this Court, in defining the term "moneyed capital", said:

"Applying this rule of construction we are led, in the first place, to consider the meaning of the words, 'other moneyed capital' as used in the statute. Of course it includes shares in national banks; the use of the word 'other', requires that. If bank shares were not moneyed capital, the word 'other' in this connection would be without significance. But 'moneyed capital' does not mean all capital, the value of which is measured in terms of money. * * *

The business of banking, as defined by law and custom, consists in the issue of notes payable on demand, intended to circulate as money where the banks are banks of issue; in receiving deposits payable on demand; in discounting commercial paper; making loans of money on collateral security; buying and selling bills of exchange; negotiating loans, and dealing in negotiable securities issued by the government, state and national, and municipal and other corporations. These are the operations in which the capital invested in national banks is employed, and it is the nature of that employment which constitutes it in the eye of this statute 'moneyed capital'. Corporations and individuals carrying on these operations do come into competition with the business of national banks, and capital in the hands of individuals thus employed is what is intended to be described by the

Act of Congress. That the words of the law must be so limited appears from another consideration: they do not embrace any moneyed capital in the sense just defined. * * *

The terms of the Act of Congress, therefore, include shares of stock or other interests owned by individuals in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money. The moneyed capital thus employed is invested for that purpose in securities by way of loan, discount, or otherwise, which are from time to time, according to the rules of the business reduced again to money and reinvested. It includes money in the hands of individuals employed in a similar way, invested loans, or in securities for the payment of money, either as an investment of a permanent character, or temporarily with a view to sale or repayment and reinvestment. In this way the moneyed capital in the hands of individuals is distinguished from what is known generally as personal property."

Counsel's theory as to just what capital is "competitive" is somewhat novel, but no extended argument is required to demonstrate its unsoundness in principle. For example, counsel contend that the automobile finance companies cannot properly be said to be "in competition" with banks. These companies are engaged in financing the business of automobile dealers by purchasing from the dealers notes and installment contracts secured by liens on automobiles sold by the dealers to their customers. In some instances the dealer was required to endorse such paper; in other instances the finance companies exacted a large discount and took the paper "without recourse". Petitioner during the four years here in controversy made loans to dealers in automobiles for the purpose of financing their business, and in many instances discounted, with the dealers' endorsement, notes given to the dealers by purchasers of automobiles. (See testimony of Grant McPherrin, Record 562-564, 570-672.) The record even shows that in some instances, petitioner was making

loans to the identical dealers from whom the finance companies bought paper.

It is true of course that the *form* of the transaction is not identical in the loans made by Petitioner with the transactions of the finance companies; yet both transactions have the same ultimate purpose—to increase the working capital of the automobile dealer and thus enable him to expand his sales. The earnings or profit to petitioner on such a transaction comes from interest on the amounts loaned, while in the case of the finance companies, the earnings are the interest payments made by the purchaser of the automobile, plus the discount, granted by, or exacted from the dealer. In both cases the object of the business is to make a profit from the use of the business capital as money, and for that purpose the capital of the business is invested in securities, by way of loan, discount or otherwise, which are from time to time reduced again to money and reinvested. See *Mercantile National Bank v. Mayor, etc., of New York*, 121 U. S. 138.

A reading of the testimony of the witness J. R. Capps will readily disclose that a substantial portion of petitioner's loan business consisted of loans and advances to automobile dealers. It is of course common knowledge that a very large percentage of all the automobiles sold in this country are sold on "time", or deferred payments. A dealer in automobiles may prefer to carry this paper himself, borrowing funds from his banker to enable him to do so, or he may, particularly if the volume of installment payments be large, prefer to turn the transactions over to a finance company who will relieve him of the necessity of looking after collections, and who will carry the risk of defaults in payments in return for a substantial discount. If the finance company is ably managed, builds up a large volume of business, and is able to offer relatively low discount rates it will obviously be favored by the automobile dealer, who will turn over to it all of his installment business, and the bank may see him no more

as a borrower of funds. Yet counsel say that the business of the finance companies is not "competitive" with that of petitioner! We believe Justice Stone had in mind just such situations as are here presented when he said in *First National Bank of Hartford v. Hartford, supra:*

> "With the great increase in investments by individuals, and the growth of concerns engaged in particular phases of banking as shown by the evidence, discrimination with respect to capital thus used could readily be carried to a point where the business of national banks would be seriously curtailed."

Manifestly, automobile finance companies such as the Iowa Guaranty Mortgage Corporation, the Bond and Mortgage Company of Iowa, the Des Moines Morris Plan Company, and the Continental Mortgage & Loan Company, were carrying on a business which if extended to its full limits might ultimately deprive all commercial banks of the loan business of dealers engaged in selling automobiles. Consequently, these corporations are in competition with the business of petitioner, and the moneyed capital represented by the shares of such corporations is directly within the prohibition contained in Section 5219 of the Revised Statutes.

On pages 95 and 96 of their brief, counsel for respondents advance substantially the same argument with respect to the so-called "cattle paper". The Record discloses that the United Cattle Loan & Livestock Corporation, the National Investment & Finance Company, the Union Mortgage & Cattle Loan Company, and the Federal Cattle Loan Society made loans to growers or feeders of livestock, secured by chattel mortgages on the animals. (See Record 318-323, 274-280, 743.) Grant McPherrin, petitioner's president, testified that petitioner made direct loans to its customers to finance the purchase and feeding of cattle. (See Record 565, 646-648 incl.)

The statement of counsel in respondents' brief, page 96, that "The banks have not testified to a single loan made on the security of cattle." is therefore directly contrary to the Record. It affirmatively appears without dispute that the loaning of funds to growers and feeders of livestock was a substantial portion of the business of national banks in Iowa. On page 630 of the Record is reproduced a tabulation taken from the report of the Comptroller of the Currency, which discloses that on November 15, 1920 national banks in the City of Des Moines had loaned to "farmers, agriculturists, and livestock raisers" more than $9,000,000, while national banks in the smaller communities of the state had more than $137,000,000 invested in similar loans.

The largest of these cattle loan companies was the United Cattle Loan & Livestock Corporation. This one institution in 1920 made loans on the security of cattle to the extent of $1,500,000, many of the loans being sold to banks in Iowa and elsewhere. Both this company and the Federal Cattle Loan Society got in touch with their prospective borrowers through country banks in Iowa. The statements set forth on page 96 of respondents' brief are therefore incorrect and without support in the Record.

In the case of *Minnesota v. First National Bank of St. Paul*, 273 U. S. 561, this Court directly held that dealers in "cattle loan paper" were in competition with national banks and that capital invested in the cattle loan business was within the restriction found in Section 5219 of the Revised Statutes. We quote from the opinion of Justice Stone, the following:

> "Note brokers within the state in those years made loans to their customers upon paper which they sell to banks and other investors, amounting to as much as $100,000,000 annually. Much of this paper is sold outside of the state, but the amount sold to banks and to individuals within the state is substantial. One class of

> this paper known as 'cattle loan paper' exceeded $22,000,000 annually in the years in question, and of this $13,000,000 was sold to banks, corporations, firms, and individuals in Minnesota. The amount shown to have been sold to individuals approximated $1,000,000."

No further comment upon our part is needed. It is manifest, of course, from the quotation, that companies directly engaged in the "cattle loan business" are in competition with national banks.

The Security Loan & Investment Company, the Bond & Mortgage Company of Iowa, the Jesse F. Stevenson Company, and the Continental Securities Company were shown to be engaged in "financing public improvement contractors."

On pages 96-98 inclusive of their brief, counsel for the respondents urge that business of this type is not "competitive" with national banks. Petitioner was shown to have been engaged during the four years in question in making loans to public improvement contractors to enable them to complete their improvements. In 1919 such loans totalled $103,572.90; in 1920, $82,430, in 1921, $198,899 and in 1922, $159,031. (R. 564.)

As in the case of the automobile finance companies, there were slight differences in the methods adopted by the various companies engaged in financing these contractors. For that matter, there are differences in the financing methods of banks. One bank may require a larger measure of security than another or extend greater credit on the same security. Can it be that such facts alone render their business non-competitive in character? The Record shows without dispute that petitioner was engaged in the business of making loans to public improvement contractors in the identical field in which these finance companies operated. Hence, within the rules laid down by this Court, the business of the bank and the business of the finance companies were in

competition, and the moneyed capital of the finance companies is within the restriction imposed by Section 5219.

Counsel also urge that the stock of mortgage loan companies, and real estate mortgages made for the purpose of investment by individual citizens do not constitute "moneyed capital" within the meaning of Section 5219 of the Revised Statutes. In support of ths position they cite the decision of the Iowa Supreme Court in *First National Bank v. Anderson*, 196 Iowa 587. We are at loss to understand just why counsel should cite this case as an authority, because the case was reversed by this Court. (See 269 U. S. 341.) In that case this Court, speaking by Justice Van Devanter, in referring to the allegations of the complaint, said:

> "No doubt they (the allegations of petition) are broad enough to include farm mortgages; but this does not weaken the allegation of competition, for while national banks were formerly prohibited from making loans on real estate (citing cases), the prohibition was partly withdrawn and much of that field was opened to such banks by the Acts of December 23, 1913, chap. 6, 38 Stat. at L. 273, and September 7, 1916, chap. 461, 39 Stat. at L. 754."

This Court again considered the subject in *First National Bank of Hartford v. Hartford*, 273 U. S. 548 at p. 560, where, speaking by Justice Stone, it said:

> "They are authorized, with certain limitations, to loan money on real estate mortgages. Act of December 23, 1913, *supra;* Act of September 7, 1916, *supra;* Act of February 25, 1927, sec. 24. Here plaintiff is shown to have investments in real estate mortgages and to be engaged in selling them. The sale of mortgages and 'other evidences of debt' acquired by way of loan or discount with a view to reinvestment is, we think, within the recognized limits of the incidental powers of national banks. *Compare First Nat. Bank v. Anderson*, 269 U. S. 348, 70 L. ed. 303, 46 Sup. Ct. Rep. 135; *Mercantile Nat. Bank v. New York*, 121 U. S. 156, 30 L. ed. 902, 7 Sup.

Cir. Rep. 826. To that extent the business of acquiring and selling such mortgages and evidences of debt, carried on by numerous individuals, firms, and corporations in Wisconsin, comes into competition with this incidental business of national banks. That the exercise of this incidental power has become of great importance in the business of national banks appears from the Report of the Comptroller of the Currency for 1924, 44 *et seq.*, showing that approximately one-third of the investment of national banks consists of government, railroad, public service corporation and other bonds, and 'collateral trust and other corporation notes.'"

In this case it affirmatively appeared from the Reports of the Comptroller of the Currency offered in evidence that national banks in the City of Des Moines, and in Iowa, made loans on real estate mortgage security. Thus, on page 628 of the Record it appears that national banks in the City of Des Moines on June 30, 1919 held $110,000 secured by improved real estate under authority of Section 24, Federal Reserve Act as amended, while national banks in Cedar Rapids, Dubuque, and Sioux City held such loans to the extent of $1,000,000. "Country banks" in the smaller communities in Iowa held such loans to the extent of $3,192,000 on that date. On June 30, 1920 (Record p. 635) national banks in Cedar Rapids, Iowa, held such loans to the extent of $1,307,000, national banks in Des Moines to the extent of $273,000, and the smaller banks held $3,793,000 in such loans. On June 30, 1921, (see Record p. 638), national banks in Des Moines held $68,000 in such loans secured by farm mortgages, while national banks in Cedar Rapids, Dubuque, and Sioux City, held more than $1,000,000 of such paper, and country banks held such loans to the extent of $3,264,000.

Petitioner during all of the years in question was directly engaged in making real estate mortgage loans. The record discloses that in 1919 $391,464 of such loans were made, in 1920, $1,775,112, in 1921 $471,350 and in 1922 $3,159,478. It

is apparent therefore that the mortgage loan companies were directly in competition with petitioner and since the business of making such loans constituted a part of the business normally carried on by national banks the shares of such loan companies came within the definition of the term "moneyed capital" as used in Section 5219 of the Revised Statutes.

Counsel for the respondents developed on cross examination that many of the companies engaged in the loan and investment business borrowed money from banks in the City of Des Moines, including petitioner. They seem to feel that this fact establishes that there was no competition between banks and the finance companies. Much of their argument with respect to "competition" is predicated on the theory that no institution with which banks had friendly dealings can be regarded as in competition.

This same argument was urged before the Circuit Court of Appeals for the 8th Circuit in the case of *Munn v. Des Moines National Bank*, 18 Fed. (2d) 269. Circuit Judge Sanborn disposed of the contention in these words:

> "Counsel argue that the decrees below should be reversed, because the banks are estopped from maintaining their suit by the fact that they loaned money to some of their competitors in Polk County. But we discover nothing in that fact, if it existed, which in any way estops them from maintaining the suits before the court below and before us. The objection to the decrees on that account is in our opinion untenable."

The record discloses that petitioner loaned money to other banking institutions in the City of Des Moines and elsewhere. According to counsel for the respondents, this conclusively establishes that petitioner was not in competition with the banks to which loans were made. Such position, it seems to us, is little short of absurd. In *First National Bank of Hartford v. Hartford, supra*, it appeared that one of the principal companies, which was accorded a more favorable basis

of taxation than complainant, was affiliated with, and its stock held by stockholders of the First Wisconsin National Bank of Milwaukee; yet the shares of this company were held to be moneyed capital. If shares of such a corporation are competitive with other national banks within the meaning of Section 5219, surely the mere fact that the companies engaged in the loan and investment business in the City of Des Moines found occasion to borrow funds from banks in Des Moines does not render the capital employed in such enterprises non-competitive.

In the instant case the evidence on behalf of petitioner showed that large amounts of money were loaned by individual investors in the same territory in which petitioner engaged in making loans. In several instances it was shown that officers and employees of various companies made loans to the companies. In *Minnesota v. First Nat. Bank of St. Paul*, 273 U. S. 561, Justice Stone, in discussing the character of the moneyed capital shown by the record in that case, said: "Eleven business concerns to whom respondent made loans borrowed from their own officers and employees in one of the years in question about $1,500,000."

We have not included in our proof purchase money mortgages, accounts, or money on deposit in banks. We have confined the evidence to loans and investments by individuals in securities such as normally enter into the business of banking, together with evidence as to the business activities of corporations engaged in the loan and investment field in which petitioner was engaged. We believe that the record in the instant case discloses the existence of large and material amounts of moneyed capital, and that the direct character of the competition is more clearly disclosed than in the cases of *First National Bank of Hartford v. Hartford*, and *Minnesota v. First National Bank of St. Paul, supra*. The evidence, we submit, establishes with greater particularity the existence of moneyed capital in competition with the peti-

tioner than in either of the cited cases, and for that matter, than in any of the cases determined by this Court within the past fifteen years, including the cases of *Merchants National Bank v. Richmond*, 256 U. S. 635; *Montana National Bank v. Yellowstone County*, 276 U. S. 499, and *Commercial National Bank of Miles City v. Custer County*, 275 U. S. 502, in which the decision of the Montana Supreme Court was reversed on the authority of *First Nat. Bank of Hartford v. Hartford*.

We submit, therefore, that the record abundantly discloses the existence of large and material amounts of moneyed capital within the meaning of Section 5219 of the Revised Statutes which were taxed at discriminatory rates. We believe that the majority of the Supreme Court of Iowa concede the existence of such moneyed capital; but even though the opinion be construed otherwise, under the record no other conclusion can be arrived at. The contention of counsel for respondents is directly contrary to the prior decisions of this Court, and surely cannot be sustained.

IV.

By Proposition IV in respondents' brief (Pages 119 to 121) it is contended that since the claimed unlawful and unconstitutional discrimination arose out of the administration of the tax laws of the State of Iowa, rather than because of the terms of such laws, petitioner may not have relief unless it can show that its actual competitors, and not its possible competitors, have been favored by lower rates of taxation. As supporting this contention, respondents rely upon the decision of the Iowa Supreme Court in the case of *First National Bank of Guthrie Center v. Anderson*, 196 Iowa 587, which case was by this Court reversed. See *First National Bank v. Anderson*, 269 U. S. 341.

But, aside from the fact that the case relied upon has been reversed by this Court, the contention is not only unsound,

but is opposed to other decisions of this Court. In *First National Bank of Hartford v. Hartford*, 273 U. S. 548, at 559, it is said:

> "We do not conceive that in order to establish the fact of competition it is necessary to show that national banks and competing investors solicit the same customers for the same loans or investments. It is enough, as stated, if both engage in seeking and securing in the same locality capital investments of the class now under consideration which are substantial in amount".

Furthermore, as we have hereinbefore pointed out, the record abundantly shows that there was in each of the years involved in this case, in the same taxing district as petitioner, capital which was seeking and securing investments of the class under consideration in the same locality in a substantial amount, and, indeed, in some instances was seeking and securing investments from identical parties to whom petitioner was loaning money.

V.

By Proposition V of respondents' brief (Pages 121 to 123) it is contended that all of the corporations, the assessment of whose capital stock was changed by the County Auditor of Polk County so as to subject it to a grossly favored rate of taxation when compared to the assessment of the shares of stock of petitioner, must be excluded from consideration because Section 5219 of the Revised Statutes forbids discrimination as to taxes on "moneyed capital in the hands of individual citizens", the argument being that corporations are not individual citizens, and that the statute forbids such discrimination only as to capital in the hands of individuals.

First, it will be noted that under the laws of Iowa (Section 1310, Code Supp. 1913; Appendix to Petitioner's Brief, Page 84) corporation shares of stocks are assessable and the

tax imposed thereon collectible from the owner thereof, so that the holders of such corporation shares of stock are individual citizens within the meaning of Section 5219; and, next, this question has been definitely determined by decisions of this Court. In the case of *Mercantile National Bank v. Mayor*, 121 U. S. 138, it is said:

> "The terms of the Act of Congress, therefore, include shares of stock or other interests owned by individuals in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money."

To the same effect see *Evansville National Bank v. Britton, Treasurer*, 105 U. S. 322; *Merchants National Bank of Richmond v. Richmond*, 256 U. S. 635; *First National Bank of Hartford v. Hartford*, 273 U. S. 548.

VII.

By Proposition VII in respondents' brief (Pages 123 to 128) it is contended that different classes of people or property may be taxed at different rates if there is a reasonable classification under the Constitution of the State of Iowa, and that the administrative officers of the State and its subdivisions had the right to decide which particular class should be taxed in one manner and which in another, and that the taxation of the property complained of was not shown to be so similar to banks that to put it in another class for the purposes of taxation would be purely arbitrary classification.

There is no question of the power of the State of Iowa, through its legislature, to validly adopt reasonable classifications of property for the purposes of taxation under the State Constitution. The legislature of the State, by the enactment of Section 1310, Code Supp. 1913 (Appendix to

Petitioner's Brief, Page 84), has exercised this power of classification and has provided:

> "All moneyed capital within the meaning of Section 5219 of the Revised Statutes of the United States shall be listed and assessed against the owner thereof at his place of business, and if a corporation, at its principal place of business, at the same rate as state, savings, national bank, and loan and trust company stock is taxed in the same taxing district and at the actual value of the moneyed capital so invested."

Thus, it will be seen that there is no room for this contention of respondents, because the legislature of the State of Iowa, acting within its constitutional powers, has expressly made the classification, and the record shows that regardless of this act of the legislature large and substantial amounts of such moneyed capital have been by the administrative officers of the State deliberately, intentionally, habitually, and generally subjected to a grossly favorable and discriminatory rate of taxation. Certainly it cannot be that an administrative officer of the State has the power to classify property for taxation against the express and direct mandate of the acts of the legislature of the State, for it is the function only of the administrative officers to enforce and apply the laws of the State, and not to make them.

It is worthy of note in this connection that the Supreme Court of the State of Iowa in its decision paid no heed to this contention, but even the opinion of the majority of that Court is predicated upon the assumption that there had been a valid classification of property subject to taxation by the act of the legislature of the State of Iowa which was controlling.

VIII.

By Proposition VIII of respondents' brief, (Pages 128 to 132, inclusive) it is contended that the act of the county auditor of Polk County, Iowa in habitually, wilfully, intentionally, systematically and generally taxing a large and substantial amount of moneyed capital at a grossly favorable and discriminatory rate in each of the years in question, was contrary to the laws of the State of Iowa, and as such constituted a violation of the laws of that State, and, that it rests solely with the Courts of Iowa to correct such violation of its laws, and that therefore no constitutional or federal question can arise therefrom. The case of *Barney v. New York*, 193 U. S. 430-8, is relied upon as supporting this contention.

Insofar as the case of *Barney v. New York, supra*, may seem to adopt the principle that an act invalid by a state law cannot be regarded as the act of the State, and that hence no federal question is involved, it must be regarded as overruled by *Raymond v. Chicago Union Traction Company*, 207 U. S. 20 and *Home Telephone and Telegraph Co. v. Los Angeles*, 227 U. S. 278, where it is, among other things, said:

> "If there were room for such conclusion in view of what we have said, it would be our plain duty to qualify and restrict the *Barney* case insofar as it might be found to conflict with the rule here applied."

In respondents' argument under Proposition VIII it is said that petitioner has seized upon the phrase and fact that the officers of Polk County, State of Iowa, charged with the administration of the tax laws, did in each of said years "habitually, intentionally, wilfully, systematically and generally assess petitioner's competitors in the alleged improper manner complained of for the reason that this is a mystic shibboleth which the United States Courts have fixed upon

in order to be able to say that the *administration* of the law as distinguished *from the law itself* is in contravention of the provisions of Section 5219 of the Statutes of the United States."

We think counsel have wholly misconceived the theory of petitioner's action in this respect. This Court, in repeated cases, has laid down the rule that the intentional and systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property. This is no catch word or phrase of the Federal Courts, as the brief of respondents asserts, but is a doctrine firmly established and settled by repeated decisions of this Court. See

Reagan v. Farmers Loan & Trust Co., 154 U. S. 362.
Sunday Lake Iron Company v. Wakefield, 247 U. S. 350.
Cummings v. Merchants Nat'l Bank of Toledo, 101 U. S. 153.
Raymond v. Chicago Union Traction Company, 207 U. S. 20.
Sioux City Bridge Co. v. Dakota County, 260 U. S. 441.
Taylor v. L. & N. R. R. Co., (C. C. A.), 88 Fed. 350.

It is further argued under Proposition VIII in respondents' brief that the county auditor testified that in making the changes and classification, he acted in good faith and in the belief that he was assessing the corporations as they should be assessed under the law, and that this would show that there was no habitual, wilful, intentional, systematic, or general attempt on his part to violate the law, or to create improper discrimination as against the plaintiff national bank.

It is not necessary that such intentional, habitual, systematic, and general acts were meant by such taxing officials to injure the petitioner, for, as said by Justice Taft in *Taylor v. L. & N. R. R. Co.*, (C. C. A.) 88 Fed. 350:

"It is true that it must appear that the taxing officers whose acts of undervaluation created the unjust burden, must intentionally and habitually violate the law by assessing property at a less valuation than that which they know to be the true value, but *it is not true that they must be shown affirmatively to intend to injure complainant and his class of taxpayers in so doing.*" (Italics ours.)

We therefore submit that the contentions advanced in connection with Proposition VIII of respondents' brief are not sustainable.

IX and XI.

By Propositions IX and XI in respondents' brief (Pages 132 to 138) it is contended that petitioner is precluded from relief by reason of an adjudication, laches, and estoppel.

The same contentions were advanced in the Supreme Court of Iowa, and while the majority opinion does not predicate its conclusions thereon in any degree, the minority fully answer and deny the same. (Record, pages 1387-1388).

The argument advanced is so confused that we are unable to determine just what facts are relied upon as establishing one of these defenses rather than the other, but we shall treat them in the order in which they are stated.

Concerning the plea of former adjudication, reference is made to certain appeals prosecuted from the Board of Review by the Iowa National Bank and Central State Bank. It appears that in the years 1919 to 1921, inclusive, the Iowa National Bank and Central State Bank prosecuted appeals from the Board of Review involving the claimed right of the banks to deduct the par value of Liberty bonds held by them from the amount of the assessment of their shares of stock. In the year 1919 the appeals from the Board of Review were tried, and judgments rendered in the District Court of Polk County, Iowa canceling the assessments upon the shares of

the bank's stock, and a stipulation was entered into by counsel under the terms of which it was provided that the Iowa National Bank and the Central State Bank cases should abide the result of the appeal to the Supreme Court in the similar case known as *Des Moines National Bank v. Fairweather, et al.* The *Des Moines National Bank* case was appealed, and the judgment of the Polk County District Court was reversed. A writ of error was prosecuted to this Court to review the judgment of the Supreme Court of Iowa, and that judgment was affirmed. The Iowa National Bank and the Central State Bank commenced suits in equity in the United States District Court of Iowa to enjoin the collection of taxes upon their shares of stock for the four years in question in excess of the five mill rate. These suits in the Federal Court were based on substantially the same facts now relied upon by the banks.

Appeals from the Board of Review for the years 1920 and 1921 were never tried nor determined, but were voluntarily dismissed. Respondents now urge that these proceedings constitute a bar to the maintenance of the present suit. An examination of the proceedings in the case of *Des Moines National Bank v. Fairweather*, 263 U. S. 103, will readily disclose that the questions now urged were never brought before the courts in that case at all. The questions were not raised, they were not considered, and therefore that case constitutes no adjudication. It is a well settled rule that a judgment in a prior action between the same parties operates as an adjudication or an estoppel only as to those matters in issue, upon the determination of which a finding was rendered.

In *Cromwell v. County of Sac*, 94 U. S. 351, 24 Law ed. 195, it appeared that bonds of Sac County, Iowa, had been delivered to a contractor in payment for public improvements. One of these bonds ultimately came into the hands of one Smith. Smith sued on one of the interest coupons

but failed to show that he was a bona fide purchaser for value, and as the bonds were fraudulent, the Iowa court ruled that Smith was not entitled to recover. Cromwell became the assignee of some of the bonds held by Smith, and brought action upon them, and it was contended that the action by Smith constituted an adjudication. This Court in passing upon the question said:

> "In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example; a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defenses were not presented in the action,—and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented, in the action, but also as to every ground which might have been presented is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment cannot again be brought into litigation between the parties in proceedings at law, upon any ground whatever.

But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action; not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

See also:

United Shoe Mach. Co. v. United States, 258 U. S. 451, 66 Law ed. 708.
Radford v. Myers, 231 U. S. 725, 58 Law ed. 454.
Alt v. Young, 181 Iowa 1260.
Nesbit v. Independent District of Riverside, 141 U. S. 610; 36 Law ed. 562.

The identical defense now urged was urged in the case of *Munn v. Des Moines National Bank*, 18 Fed. (2) 269 but the Circuit Court of Appeals found it untenable. In the opinion by Circuit Justice Sanborn, it is said:

"Another contention of counsel for the treasurer is that these banks did select and pursue the remedy offered to them by section 1373 to establish the causes of action pleaded in this suit and that in those proceedings those causes of action were finally adjudged against them. In the consideration of this claim we take the case of the Des Moines National Bank and the year 1919 because they are typical of the facts in all the cases in hand. * * *

Nor did this petition contain any prayer for any relief on account of the taxation of this competitive moneyed capital or the use of it. The board of review allowed a deduction of $62,000 from the total amount of the capital, surplus and undivided earnings of the bank assessed on account of the bank's obligation based

on its indebtedness to the stockholders of the German Savings Bank, and granted no other relief. Thereupon the bank filed a petition in the district court of Polk County, Iowa, against the members of the board of review in which it repeated the averments made in its petition to the board with the exception of the averments about the $62,000. This second petition, however, contained no averment of the amount of moneyed capital of any party or person used or usable in 1919 in competition with the moneyed capital of the bank, or of the aggregate thereof, and its prayer was that the assessment of the bank's property be lowered to the extent of the par value of the securities issued by the United States owned by it on January 1, 1919, and by the amounts of those owned by it for sixty days prior to December 1, 1918, and for such further relief as to the court should seem meet. It contained no prayer for any relief on account of the discriminatory taxation of competitive moneyed capital and no averment of the amount or value of such capital or any part of it. The defendants demurred to the petition, the district court sustained the demurrer, the bank appealed to the Supreme Court of the State, that Court reversed the judgment of the district court, and the plaintiffs appealed to the Supreme Court of the United States and that court affirmed the judgment of the Supreme Court of Iowa. *Des Moines National Bank v. Fairweather*, 191 Iowa, 1240, 1253, 1254, 181 N. W. 459, 184 N. W. 313; *Des Moines National Bank v. Fairweather*, 263 U. S. 103, 105, 114, 116, 44 S. Ct. 23, 68 L. Ed. 191. But those courts did not consider, discuss, or decide the question whether the petition stated any cause of action on account of discriminatory taxation between the shares of the bank and the moneyed capital in the hands of individual taxpayers used in competition therewith. * * *

The claim of counsel is that by the proceedings of this bank in its former case, the cause of action pleaded and tried in this suit was pleaded and adjudged against the bank. The test of the identity of causes of action is the identity of the facts essential to maintain them. *Harrison v. Remington Paper Co.*, (C. C. A.) 140 F. 385, 400, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314; *Union Central Life Ins. Co. v. Drake*, (C. C. A.) 214 F. 536, 545; *Pierce*

v. Nat'l Bank of Commerce, (C. C. A.) 268 F. 487, 496. Because in that former proceeding instituted before the board of review and continued in the state court the bank did not plead the amount of other moneyed capital in competition with the business of the bank held by any of the parties it named in its pleadings, or the aggregate amount they so held, because in those proceedings the bank did not pray for any relief on account of discrimination against it by the taxation of competitive moneyed capital, because it did not prove any such discrimination, and because, if any evidence of discrimination in taxation could have been lawfully received under those former pleadings, and we are of the opinion that none could have been over proper objection, radically different evidence and a very large amount of it was indispensable to sustain the cause of action in this case, our minds have been forced to the conclusion that this bank was not estopped by its former proceedings from commencing and prosecuting to a favorable decree the cause of action pleaded by it in this suit."

This was a determination by the Circuit Court of Appeals of the Eighth Circuit, under the very facts disclosed here, that the proceedings, which counsel contend constitute an adjudication of this controversy, would not bar a suit in equity to enjoin the collection of the taxes. Further citation of authority on this proposition seems unnecessary.

On Page 135 of respondents' brief it is said, with regard to the dismissal of the cases seeking injunctions against the collection of the taxes:

"If this does not constitute an adjudication, it certainly would constitute estoppel and laches on the part of these petitioners."

No authority is cited for this novel proposition. It is a fundamental rule recognized in Iowa that the voluntary dismissal of an action by complainant does not constitute an adjudication of any of the matters at issue in the pleadings.

See

Newberry v. Newberry, 114 Iowa, 704.
Brown v. Holden, 120 Iowa, 191.
Atkins v. Anderson, 63 Iowa, 739.

It is further contended by respondents that the petitioner was guilty of laches which will bar its claim. The only cases cited in support of this contention are the cases of *Slimmer v. Chickasaw County*, 140 Iowa, 448, and *Farmers Insurance Co. v. Linn County*, 202 Iowa 444. The facts in the case of *Slimmer v. Chickasaw County* were that a property owner listed his property for taxation in one county. Subsequently a tax ferret discovered that he had been a resident of another county, and a compromise settlement of his claim of liability to taxation in the second county was made. Subsequently the plaintiff sued to recover the money paid in carrying out this settlement. It was held that he could not recover the money so paid in an action at law against the county.

It is not contended here that the county officers changed their position in reliance upon any action or lack of action on the part of petitioner. It is not denied that the county officers were at all times advised that the banks were claiming that the taxes were illegal, and that the officers were without authority to exact them. Consequently there is no basis for the equitable plea of laches, nor does the claim of estoppel find support in the record. It must be borne in mind that the litigation involving the right to the deduction of liberty bonds and other federal securities was not finally determined until November, 1923. Claims for refund were filed in approximately one year and nine months after the payment of the taxes. It seems to us quite apparent there is no basis in this record for a plea of laches or estoppel, and we do not believe that counsel for the respondents seriously contend to the contrary.

Where taxes are void or illegal, a taxpayer is not required to resort to all remedies which might possibly be available to him before payment of the taxes. He has the legal right to rely upon Section 7235 of the Code and to pay the taxes and to bring proper proceedings to procure a refund thereof.

See *Dickey v. County of Polk*, 58 Iowa, 287, where the Supreme Court of Iowa said:

> "Before payment of the illegal taxes the law secures other remedies to the taxpayer. He may appeal from the action of the court of equalization, as in *Getchell v. Supervisors, supra*, and *Ingersoll v. Des Moines*, 46 Iowa 553, or he may invoke the aid of a writ of certiorari, as in *Royce v. Jenney, et al.*, 50 Iowa 676. But he could gain no relief by these remedies after payment of the taxes. They are intended to protect him from the enforcement of the taxes by collection. When the taxes have been paid his only remedy is by action to recover them back. His failure to pursue remedies to arrest the collection of the taxes, does not waive or forfeit his right to bring such an action. The obvious purpose of Code, section 870, is to give a remedy by action to recover for taxes paid which the taxpayer could not have been compelled to pay."

X.

By Proposition X in respondents' brief (Pages 138 to 141) it is contended that the taxes involved were not void or illegal within the meaning of Section 1417, Code of Iowa, 1897 (Appendix to petitioner's brief, Page 90), and that the payments were voluntary, which precludes relief to petitioner.

Again we may point out that the majority opinion of the Supreme Court of Iowa is not based upon this contention in any degree, although it was presented, and also that the

minority opinion (Record, Page 1392) completely answers and denies this contention.

Furthermore, we have already seen in the consideration of the facts disclosed by this record that the taxes are void, not merely irregular, nor does the record disclose that counsel's contention with respect to the voluntary character of the payments is true in point of fact. At the time of the payments by the petitioner, actions in equity were pending against the county treasurer involving the same questions upon which this suit is based. The tax receipts were all endorsed "Paid under Protest". What more was required on the part of the petitioner to enable it to invoke the rights given by said Section 1417 of the Iowa Code? Under the decisions of the Supreme Court of Iowa no particular protest is necessary in order to preserve the rights of a taxpayer to a refund under this Section. In fact, that Court has frequently held that where the payment of taxes was entirely voluntary, such fact presented no obstacle to a refund under the law. Such was the holding in *Lawman v. Des Moines County*, 29 Iowa 310; *Richards v. Wapello County*, 48 Iowa 507; *Dickey v. County of Polk*, 58 Iowa 287; *Commercial National Bank v. Board of Supervisors*, 168 Iowa 501. In the case last cited the Court said:

> "The taxes were voluntarily paid as contended, but this furnishes no objection to refunding under this statute."

Nor is it true, as contended by respondents, that payment of the taxes without a specific protest waives the taxpayer's right to demand a refund in all cases except where the whole tax is void *in toto*.

The case of *Hawkeye Company v. Marion*, 110 Iowa 468, cited by counsel, is inapplicable. That case involved a special assessment for the construction of a sidewalk, and the holding was that a property owner who voluntarily pays

the amount of his assessment cannot sue the town for its recovery. The refund statute is inapplicable to special assessments.

Furthermore, as pointed out in petitioner's previous brief, the payment of the taxes was under compulsion and to avoid the imposition of additional large penalties, and under such circumstances it has been clearly established by the decisions of this Court that relief may be had.

See

Carpenter v. Shaw, 280 U. S. 363.
Ward v. Love County, 253 U. S. 17.

XII.

By Proposition XII in respondents' brief (Pages 141 to 148) it is contended that the petitioner has not come into equity with clean hands: first, because some of the banks sold real estate mortgages and did not require the purchasers to record assignments thereof; and, second, because petitioner and other banks, either directly or indirectly, through an organization known as the Des Moines Clearing House Association, decreased the amount of interest which such banks paid upon savings deposits, and installed a charge for carrying small accounts, which actions, it is claimed, were contrary to public policy.

Again we may point out that the majority opinion of the Iowa Supreme Court paid no heed to this contention, while the minority, in speaking of this question, said (Record, 1393):

> "The appellees argue that the appellants have not come into court 'with clean hands'. We find nothing in the record of any conduct on their part in connection with the matter in litigation which is unconscionable or such as to bar them from their legal and equitable rights."

There is no room for the application of the equitable maxim resorted to in connection with this proposition for the reasons: First, because there is no proof of any inequitable or unconscionable conduct on the part of any of the banks or their officers; second, because there is no legal duty on the part of the seller of a note or mortgage to require the purchaser to record his assignment; third, because the legal duty rests upon the owner of any such mortgage, whether purchased from a bank or not, and whether an assignment thereof is recorded or not, to furnish the assessor upon demand a full and complete itemized sworn statement showing the amount of moneyed capital so used (Section 1310, Iowa Code; Appendix, Petitioner's Brief, Page 84); and, fourth, because the maxim refers only to the identical transaction under inquiry by the Court, and will not be extended to include the general moral status or conduct of a plaintiff seeking equitable relief.

It is not contended that any officer of petitioner, or of other banks in Des Moines, in the years in question advised purchasers not to record their assignments of mortgages, nor is there any evidence that a penny in tax money was lost to the State or its political subdivisions because of the failure of the officers of the banks to require that assignments of mortgages be placed of record.

The fact that petitioner was a member of the local clearing house, and the further fact that the clearing house banks some years subsequent to the time involved in this case decreased the rate of interest which was paid upon savings deposits to their depositors, or installed a charge for carrying small accounts, are urged as a basis for the holding that petitioner was a party to an illegal combination, monopoly, or trust, contrary to the public policy of the State; and in Brief Point XII a citation to Corpus Juris is relied upon as sustaining this contention. Certainly it requires no argument to demonstrate the fallacy of this contention. Noth-

ing involved in this suit is influenced in the slightest degree by the rate of interest paid to savings depositors, nor the charge for the expense incident to carrying small accounts, and certainly it is beyond any reasonable conception that such acts would constitute a combination such as prohibited by the laws of Iowa with respect to monopolies and trusts.

XIII.

By Proposition XIII of respondents' brief (Pages 148 to 154) it is contended that the petitioner is not a proper party, and that the suit should have been brought by the individual stockholders of petitioner.

Again, it will be noted that the decision of the majority of the Iowa Supreme Court is not based upon this contention, nor was any consideration given thereto by the majority. On the other hand, the question was considered, answered, and denied by the minority in so convincing a way that we take the liberty of calling to the Court's attention the following quotation from its opinion: (Record, 1388 to 1392)

> "Another contention of the appellees is, that the banks are not the proper parties plaintiff, or that there is a defect of parties, because the share holders are not joined. This contention of the appellees is also devoid of merit. See Section 1325 of the Code of 1897; *Kentedy v. Citizens National Bank*, 128 Iowa 561; *Fourth National Bank v. City of Boston*, 300 Fed. 29; *First National Bank v. Achenbach*, (Okl.) 237 Pac. 574; *McFarland v. Central National Bank*, 26 Fed. (2d) 890; *Hannan v. First National Bank of Council Bluffs*, 269 Fed. 527; *First National Bank of Watertown v. Eddy*, (S. D.) 198 N. W. 554; *National Bank of Commerce v. City of New Bedford*, (Mass.) 29 N. E. 534; *State National Bank v. City of Memphis*, (Tenn.) 94 S. W. 606; *Home Savings Bank v. Morris*, 141 Iowa 560; *Fort Madison Security Company v. Maxwell*, 202 Iowa, 1346; *Cummings v. Merchants Natl. Bank*, (U. S.) 25 L. Ed. 903.

The evidence shows, without dispute, that the banks actually paid the taxes out of their own funds and no recoupment has been made from the shareholders—no dividend has been declared out of which the taxes were paid.

Section 1325 of the Code of 1897, provides, in substance, that the bank shall be liable for the payment of the taxes assessed to the stockholders of such corporation.

In *Kennedy v. Citizens National Bank*, 128 Iowa 561, the plaintiff, a stockholder, brought action against the bank to recover an alleged dividend due the stockholder. The bank had paid the taxes from its own funds, but made no allowance therefor in the payment of dividends. The plaintiff brought suit on the theory that the payment of the tax constituted a declaration of a dividend. This court in the determination of the case, made the following pronouncement:

'The defendant bank, as was its duty, paid the taxes levied against the shares of stock from 1892 to 1898, inclusive, but neglected to retain the respective amounts from the dividends subsequently declared, or to enforce the lien thereof against the stock, as permitted by statute. See section 819, Code 1873 (section 1325, Code 1897). * * * The taxes were paid by the bank, as agent of the stockholders, in pursuance of statutes so requiring; and under the Code of 1873 it had the right 'to retain so much of any dividend belonging to any shareholder as shall be necessary to pay any taxes levied upon his shares'; and under the Code 'the corporation may recover from each stockholder his proportion of the taxes so paid, and shall have a lien on his stock and unpaid dividends therefor. If unpaid dividends are not sufficient to pay such tax, the corporation may enforce such lien on the stock by public sale of the same', etc. These claims for the repayment of the taxes, then, were assets of the bank. It had the right to collect them the same as any other indebtedness owing it, and from its omission or neglect to do so no liability in favor of any individual stockholder arose. As said, the debt belonged to the bank, and not to him, and under all

the authorities he may not maintain an action thereon for his own benefit.'

In *McFarland, County Treasurer v. Central National Bank of Topeka*, 26 Fed. (2d) 890, a demurrer to the petition on the ground that the bank could not maintain the action because the stockholders were necessary parties and the only proper parties plaintiff was overruled, the court declaring:

'The pleadings of the bank clearly alleged these facts which have been stated and others. The defendants demurred to these pleadings, the court below overruled their demurrer, and their counsel contends that there was error in this ruling, because the bank was not the real party in interest in this action and its shareholders were.

But these defendants in this case are in no position to invoke the protection of the statute, which requires actions to be brought by the real party in interest, because the prosecution by the bank of this action and its recovery from the defendants of this $12,477.26, which the bank paid to them, will protect them from any future suits or claims to that fund by any other party. The purpose of the statute is not to allow defendants to demand the adjudication of equities which exist wholly between the plaintiff and third persons, and that purpose is fully attained, so far as the defendants are not shut out from their proper defenses and counterclaims, and will be fully protected by the judgment, whether for or against the plaintiff, in the event of any other claim on the same cause. * * * The defendants cannot be heard to maintain this dog in the manger defense.

Nor, if it were heard, could the defendants sustain it. Section 79-1101 of the Revised Statutes of Kansas provided that the president, cashier, or other managing officer of this bank should furnish the assessing officer, during the month of March in each year a list of all its shareholders and of the number of shares owned by each shareholder, and a statement under oath correctly showing the amounts of capital stock, surplus and undivided pro-

fits of the bank as of March 1st of each year, and that it shall pay the tax assessed upon the shares of stock and shall have a lien thereon until the same is satisfied: Provided, that if for any reason the taxes levied upon the shares of stock shall not be paid by the institution, the property of the individual shareholders shall be held liable therefor. * * *

To prevent the seizure and sale of the property of the shareholders in payment of these illegal taxes until after a judicial decision of the question of their legality could be procured, the bank paid this $12,477.26 to the defendants. The shareholders did not pay it; there is no evidence that they ever reimbursed the bank for its payment. The defendants received this money and still have it. They have no legal or equitable right to it, or interest in it, and in law and equity they ought to pay it back to the bank, and we are of the opinion that the bank is the real party in interest in this action, and can maintain its action for it, and recover it from the defendants. *Cummings v. National Bank*, 101 U. S. 153, 156, 25 L. Ed. 903; *Hannan v. First National Bank*, (C. C. A.) 269 F. 527, 530; *First Nat. Bank v. City of Hartford*, 273 U. S. 548, 47 S. Ct. 462, 71 L. Ed. 767; *Ranchmen's Trust Co. v. Duncan*, 114 Kan. 308, 310, 219 P. 523.'

In *Fourth National Bank v. City of Boston*, 300 Fed. 29, we find the following pronouncement:

'It seems to be conceded that an action may properly be brought by the bank as the statutory tax-paying representative of the shareholders'. (Citing numerous cases.)

In *Hannan v. First National Bank of Council Bluffs*, 269 Fed. 527, it was held that since the bank is made liable for the payment of the taxes assessed to its stockholders, a pecuniary liability is imposed on the bank for the payment of the total amount of the tax imposed on all its stockholders, and that it (the bank) is the real party in interest in a suit brought to enjoin the collection of the taxes.

In *Cummings v. Merchants National Bank*, (U. S.) 25 L. Ed. 903, it was contended that a National Bank could not, as plaintiff, bring an action in equity to enjoin the collection of taxes upon its shares of stock levied in violation of Section 5219 of the Revised Statutes. The court in disposing of this contention said:

> 'In paying the money it is acting in a fiduciary capacity as the agent of the stockholders; an agency created by the Statute of the State. If it pays an unlawful tax assessed against its stockholders, they may resist the right of the bank to collect it from them. The bank, as a corporation is not liable for the tax, and occupies the position of stakeholder, on whom the cost and trouble of the litigation should not fall. If it pays, it may be subjected to a separate suit by each shareholder. If it refuses, it must either withhold dividends and subject itself to litigation by doing so, or refuse to obey the laws, and subject itself to suit by the State. It holds a trust relation which authorizes a court of equity to see that it is protected in the exercise of the duties appertaining to it.'

Other quotations of similar nature could be made from the foregoing authorities, but we deem it unnecessary. As hereinbefore stated, the banks paid the taxes out of their funds, and no dividends have been declared out of which these taxes were paid. It is quite clear that the claims for a refund are assets belonging to the banks, and that they are the proper plaintiffs in these causes of action."

By Proposition XIV in respondents' brief (Pages 155 to 157) it is contended that if the petitioner had been assessed at the rate of five mills on the dollar on all its moneys and credits, the tax would have been much more than the amount that it was compelled to pay.

In order to sustain this position it is contended that the amount of the moneys and credits of petitioner must be computed without the deduction of debts, although under Sec-

tion 1311, Code of Iowa, in force at the times involved in this case, it was provided:

> "In making up the amount of moneys or credits which any person is required to list, or to have listed or assessed, including the actual value of any building and loan shares, he will be entitled to deduct from the actual value thereof the gross amount of all debts in good faith owing by him."

In order to justify this contention respondents present the novel proposition that "the amounts due depositors by the banks is not a debt. It has been so held by the courts. The banks were the actual owners of all the money and credits in their possession. They became the owner of all the money deposited with them. Of course, they must pay it back under certain circumstances, but as long as they held it they were the owner, and the courts have so held".

This is new to us, as we believe it will be to this Court. In Iowa, as elsewhere, the laws place extra precautions and impose unusual duties in regard to the repayment of deposits by banks. Double liability is imposed upon stockholders for this purpose. And how anyone can say that a deposit in a bank is not a debt of that bank is beyond our comprehension.

By Proposition XV in respondents' brief (Pages 157 to 158) it is contended that this action is barred by the statute of limitations.

Again, we desire to call to the court's attention the fact that the majority opinion of the Supreme Court of Iowa is not based upon this contention, although it was presented; and in the minority opinion the question is considered, answered and denied. (Record, 1386-1387.) Here it is said:

> "The appellees assert that the appellants' causes of action are barred by the statute of limitations. This contention is devoid of merit. The actions were brought

within five years from the date of payment of the taxes. The period of the statute of limitations is five years and the action accrues at the time of the payment of the tax. See Par. 4, Section 11007 of the Code; *Callanan v. County of Madison*, 45 Iowa 561; *Beecher v. County of Clay*, 52 Iowa 140; *Murphy v. Board of Supervisors*, 205 Iowa 256."

XVI.

By Proposition XVI (Pages 158-160) in respondents' brief it is contended that there was no evidence of competitive moneyed capital for the year 1919. No authorities are cited to sustain this contention, and no heed was given to the contention by the Iowa Supreme Court. It appears, however, from respondents' argument that the assessments upon which the taxes were based were as of January 1, 1919, and the assessments of the competing capital shown in the Record for that year were also of the same date. The taxes based upon the assessment for the year 1919 were not payable until the year 1920, and the Record is replete with evidence showing the competitive character of other moneyed capital accorded the discriminatory rate of taxation. It would only be the indulgence in repetition to specifically call the Court's attention thereto.

XVII AND XVIII.

By Proposition XVII and XVIII in respondents' brief (Pages 160 to 162) it is contended that the judgment of the Supreme Court of Iowa was not a final judgment, and therefore petitioner is not entitled to a writ in this Court.

This contention is based upon the following situation: The opinion of the Iowa Supreme Court was filed on September 26, 1930. On October 25, 1930 respondents here, appellees in the Iowa Supreme Court, served on counsel for

petitioner a notice of intention to petition for rehearing, and the notice was filed in the office of the clerk on the same date. On October 27, 1930 petitioner served and filed a similar notice of intention to petition for rehearing. Neither party filed any petition for rehearing within the time required by the rules of the Iowa Supreme Court, and the judgment thereupon became final on November 25, 1930, sixty days having elapsed without the filing of a petition for rehearing by either party. (See R. 1408-1411, incl.)

The statutes of the State of Iowa relating to appeals and rehearings in the Supreme Court of that State having to do with this contention are as follows:

> "Section 12880. If a petition for rehearing is filed, it shall suspend the decision, if the court or one of the judges upon its presentation so order, until after the final decision on the rehearing.
>
> Section 12881. Written notice of intention to petition for a rehearing shall be served on the opposite party or his attorney and the clerk of the supreme court within thirty days after the filing of the opinion, or within such time as the court may by rule prescribe.
>
> Section 12882. Such petition shall be printed, and, with proof of service thereof on the opposite party or his attorney, shall be filed with said clerk within sixty days after the opinion is filed."
>
> "A notice of the petition for rehearing has no effect to suspend the decision, and a petition filed has no such effect, 'unless the court or one of the judges upon its presentation so order'".
>
> *State v. Cahill*, 131 Iowa 286, at 288.

The effect of the filing of the notice of intention to petition for rehearing was merely to extend the time within which such petition might be filed.

No such petition was filed in this case, and the judgment of the Iowa Supreme Court became a finality before the writ was applied for in this Court. The identical question

has been considered and disposed of by this Court. In *Southern Railway Company v. Clift*, 260 U. S. 316, at 318, this Court says:

> "A motion is made by defendant in error to dismiss the writ of error, this court, it is contended, being without jurisdiction. The grounds of the motion are specified as follows: (1) The judgment, at the time the transcript was filed, had not become final. (2) It did not decide any Federal question.
>
> To sustain the first ground, it is said that, under the law of the state, within sixty days after the termination of the case by the supreme court, 'either party may file a petition for a "rehearing".' From this it is deducted and contended that the successful as well as the unsuccessful party in the action may file a petition for rehearing, and that, until the expiration of the time for the exercise of the right, the judgment does not become final. The contention is curious. Legal procedure is a facility of rights; and rights achieved, its purpose is done. A successful litigant does not need the delay and provision of a rehearing. He has more efficient and enduring relief. His affliction may be solaced by not enforcing the victory which is the cause of it. The contention of defendant in error is so obviously untenable that further comment upon it would be the veriest supererogation."

Surely, there is no merit to the contention of respondents.

We, therefore, confidently assert that the various propositions urged by respondents are without substance, and that the decision of the Supreme Court of Iowa should be reversed, with directions to enter such order and decree as may secure to petitioner the Federal rights to which it is entitled, and which it has claimed in this proceeding.

Respectfully submitted,

J. G. GAMBLE,

A. B. HOWLAND,

Counsel for Petitioner

FILE COPY

FILED
MAY 16 193
CHARLES ELMORE CR

IN THE

Supreme Court of The United States

OCTOBER TERM, 1930.

CENTRAL STATE BANK,
Petitioner,

vs.

J. M. STEWART, et al.,
Respondents.

No. 16

MOTION FOR SUBSTITUTION OF PARTIES RESPONDENT.

J. G. GAMBLE,
A. B. HOWLAND,
Des Moines, Iowa,
Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1930.

CENTRAL STATE BANK,
Petitioner,

vs.

J. M. STEWART, et al.,
Respondents.

MOTION FOR SUBSTITUTION OF PARTIES RESPONDENT.

The petitioner respectfully states and shows the Court:

That this is an action against the respondents as members of the Board of Supervisors of Polk County, Iowa, seeking a refund of taxes erroneously and illegally exacted of petitioner in violation of the Constitution and laws of the United States. That on March 16th, 1931 this Court granted a writ of certiorari to review the decision and judgment of the Supreme Court of Iowa denying to petitioner the relief sought.

That at all times while the cause was pending before the Iowa Supreme Court, the Board of Supervisors of Polk County, Iowa, consisted of J. M. Stewart, Chairman, E. R. Bennett, C. F. Keeling, C. W. Keller and Frank E. Thornton; that the term of office of the respondent Keeling expired on January 2, 1931, and on said date he was succeeded by Ben B. Dewey; that all of the other respondents continued in office or were re-elected to succeed themselves.

That the members of the County Board of Supervisors, under the laws of Iowa, choose a chairman from among their own number; that on or about the second day of January, 1931, the respondent, E. R. Bennett was chosen as chairman of the Board of Supervisors of Polk County, Iowa, and succeeded the respondent J. M. Stewart in that capacity.

This motion for substitution is made under the terms of Section 11 of the Act of February 13, 1925, and Rule 19 paragraph 4 of the Rules of this Court.

The petitioner moves the Court for an order substituting Ben B. Dewey as respondent as the successor in office of the respondent, C. F. Keeling, and substituting E. R. Bennett as chairman of the Board of Supervisors of Polk County, Iowa, in place of the respondent Stewart.

J. G. GAMBLE,
A. B. HOWLAND,
Counsel for Petitioner.

FILE COPY

FILED
MAR 7 193
CHARLES ELMORE CR
CLE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 16

CENTRAL STATE BANK, *Petitioner,*

vs.

J. M. STEWART, et. al., *Respondents.*

RESISTANCE TO PETITION FOR A WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

ESKIL C. CARLSON,
MAXWELL A. O'BRIEN,
Counsel for Respondents.

INDEX.

Page.

General Statement as to matters involved 1
Reasons why writ should not issue 2

TABLE OF CASES CITED.

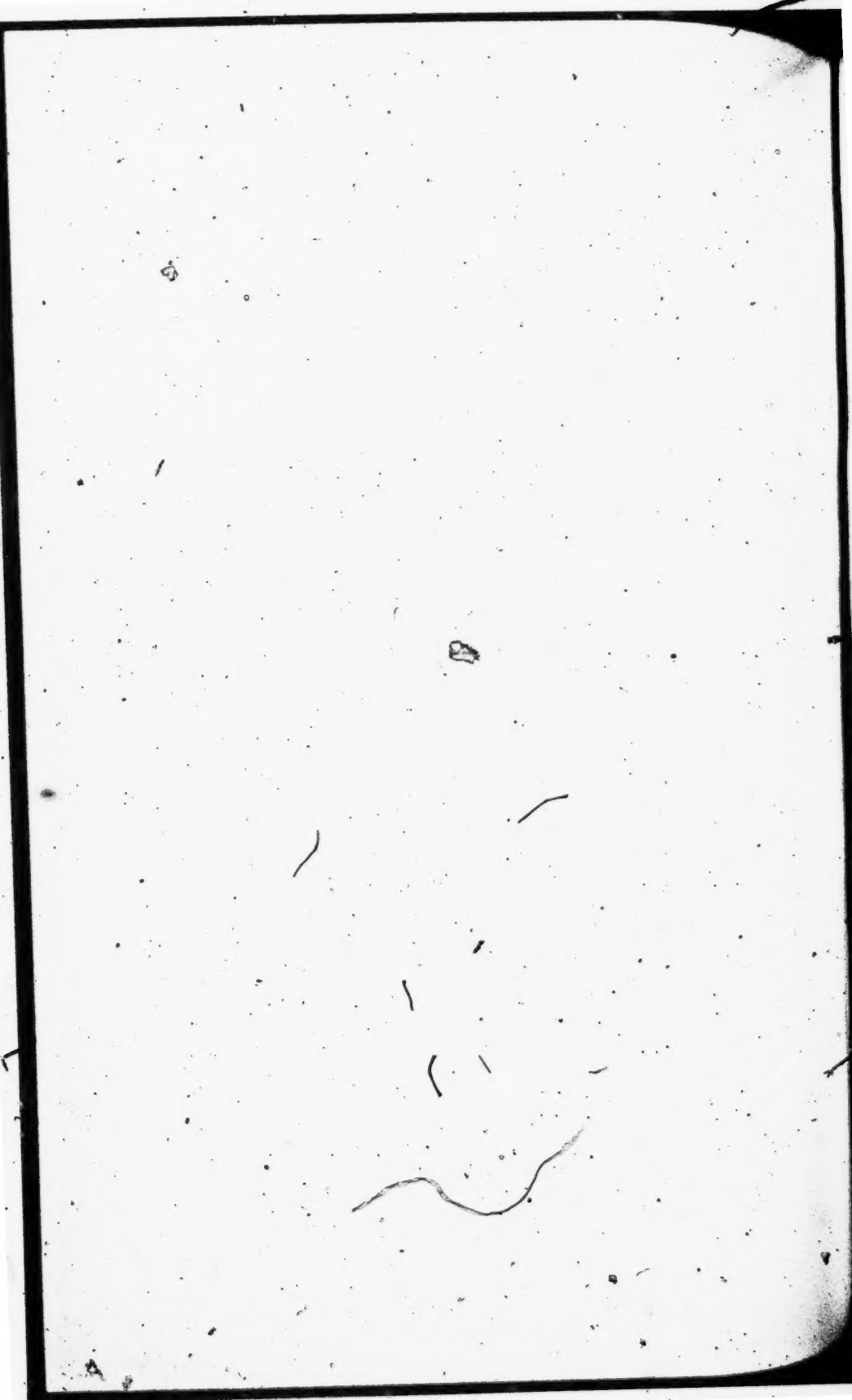
Barney vs. City of New York, 193 U. S. 430-8 5
Bells Gap Ry. vs. Commonwealth, 134 U. S. 232 7
Davenport Natl. Bank vs. Board, 64 Iowa 140 5
Eustis vs. Bolles, 150 U. S. 361-70 7
Ft. Madison Co. vs. Maxwell, 202 Iowa 1346 5
Giozza vs. Tierman, 148 U. S. 567 7
Griswold Co. vs. Calhoun Co., 198 Iowa 1240 7
Jenkins vs. Neff, 46 U. S. L. Ed. 1140 5
Layman vs. Telephone Co., 123 Iowa 591-600 7
Matthews vs. Howe, 269 U. S. 262 2
Mo. Pac. Ry. vs. Fitzgerald, 160 U. S. 556 7
Ohio River Co. vs. Fisher, 115 Fed. 929 4
Primghar State Bank vs. Rerick, 96 Iowa 238-42-4 7
Pac. Ex. Co. vs. Seibert, 142 U. S. 339 7
State vs. Hall, 54 So. 560 6

TABLE OF STATUTES CITED.

Code Sections 1927 Code of Iowa:
- Section 12881 ..... 3, 3
- Section 12882 ..... 3, 4
- Section 12880 ..... 3, 4
- Section 12875 5
- Section 12876 5
- Section 8376 7

Iowa Supreme Court Rule:
- Rule 37 4

Appendix:
- Certificate of Supreme Court of Iowa 9



Supreme Court of the United States

OCTOBER TERM, 1930.

No. 712.

CENTRAL STATE BANK, *Petitioner,*

vs.

J. M. STEWART, Chairman of the Board of Supervisors of Polk County, et al., *Respondents.*

RESISTANCE TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Supreme Court of the United States:

The respondents, J. M. Stewart as Chairman of the Board of Supervisors, et al., respectfully make this resistance to the petition for writ of certiorari filed herein:

GENERAL STATEMENT AS TO MATTERS INVOLVED.

These respondents, while not admitting the entire correctness of either the transcript filed herein, or of the statement of facts as set out in the Petition for the writ of certiorari, or in petitioner's brief in support thereof, and expressly reserving the right to deny and correct same at the proper time, does show to this Honorable Court that upon

the transcript and petition as filed this Honorable Court should not grant, and petitioner has no right to demand that a writ of certiorari issue herein for the following reasons:

REASONS WHY WRIT SHOULD NOT ISSUE.

I.

The petition if, as claimed, a federal question was involved, might have originally brought its suit in the Federal Court. Instead it voluntarily submitted itself to the jurisdiction of the State Court, and pursued its remedy to the highest court of the state, and then when the decision was against it in that court, and after all of the proceedings as set out on pages 1956 to 1959 of the transcript herein, it filed in said Supreme Court of Iowa its notice of intention to petition for a rehearing as provided by the laws of Iowa and rules of said court upon the decision of said court against it as originally rendered, thus again submitting itself to and invoking the jurisdiction of said court. That without waiting for the ruling of said Supreme Court upon said petition for rehearing, this petitioner abandoned and dismissed said petition, thus preventing any final decision on said cause, and placing the matter in such a position that neither the Supreme Court of Iowa, nor the Supreme Court of the United States, has any jurisdiction in the matter, except to carry out the decree as originally rendered by the District Court and affirmed by the Supreme Court of Iowa.

See statement and certificate of the Clerk of the Supreme Court of Iowa as set out in the appendix hereto.

Petitioner has therefore waived the right and is estopped to now sue out a writ of certiorari from this Honorable Court.

The following case supports this proposition:

Matthews vs. Howe, 269 U. S. 262.

The following are the statutes of the State of Iowa on this subject as found in the Code of 1927:

Code Sec. 12881. Written notice of intention to petition for a rehearing shall be served on the opposite party or his attorney and the Clerk of the Supreme Court within thirty days after the filing of the opinion, or within such time as the court may by rule prescribe.

Code Sec. 12882. Such petition shall be printed, and, with proof of service thereof on the opposite party or his attorney, shall be filed with said clerk within sixty days after the opinion is filed.

Code Sec. 12880. If a petition for rehearing is filed, it shall suspend the decision, if the court or one of the judges upon its presentation so order, until after the final decision on the rehearing.

II.

The petitioner, after it had procured the stay order from the Supreme Court of Iowa, as set out on pages 1958 and 1959 of the transcript, on the ground that it desired to carry said cause to the United States Supreme Court, filed in said Supreme Court of Iowa, in the manner provided by law, its notice of intention to file a petition for rehearing in said cause, thus invoking the power of that court to change the opinion and decision theretofore rendered against petitioner and thereby abandoning petitioner's right, if any it had, to sue out a writ of error from this Honorable Court.

The following are the statutes of the State of Iowa on this subject as found in the Code of 1927:

Code Sec. 12881. Written notice of intention to petition for a rehearing shall be served on the opposite party or his attorney and the clerk of the supreme court within thirty days after the filing of the opinion, or within such time as the court may by rule prescribe.

Code Sec. 12882. Such petition shall be printed, and, with proof of service thereof on the opposite party or his attorney, shall be filed with said clerk within sixty days after the opinion is filed.

Code Sec. 12880. If a petition for rehearing is filed, it shall suspend the decision, if the court or one of the judges upon its presentation so order, until after the final decision on the rehearing.

III.

After the decision of the Supreme Court of Iowa complained of herein, was filed the petitioner herein procured from the Supreme Court of Iowa, an order staying the issuance of any procedendo to the District Court, which entered the original decree, as set out on Page 1959 of transcript. That the decree and judgment of the Iowa courts did not become final and enforceable, under the laws of that state until the procedendo is sent down by the Supreme Court to the lower court, and therefore there is not yet any final decree in the State Court such as would give this Honorable Court jurisdiction under Section 237 of the Judicial Code as amended. The following case supports this proposition:

Ohio River Co. vs. Fisher, (4th C. C. A.) 115 Fed. 929.

The rule of the Supreme Court of Iowa as to procedendo is as follows:

Rule 37. No procedendo shall issue in any case until the expiration of thirty days from the filing of the opinion, except upon an order of the court, or a judge thereof, upon cause shown, and except in criminal cases and cases where petitions for rehearing have been overruled.

The provisions of the Code of Iowa of 1927 on this matter are as follows:

Code Sec. 12875. If the supreme court affirms the judgment or order, it may send the cause to the court below to have the same carried into effect, or may issue the necessary process for this purpose, directed to the sheriff of the proper county, as the party may require.

Code Sec. 12876. If remanded to the inferior court to be carried into effect, such decision and the order of the court thereon, being certified thereto and entered on the records thereof, shall have the same force and effect as if made and entered during the session of that court.

IV.

The record fails to show that there was any, intentional, systematic, general and habitual method of administering the statutes of Iowa, to the disadvantage of petitioner. The act of the auditor complained of was his individual act, without legal right or authority and contrary to the statutes of Iowa and it was so found by the Supreme Court of Iowa in its opinion as set out in the transcript beginning on Page 1900, this especial point being found on page 1914.

The following cases support this proposition:

Davenport Natl. Bank vs. Board, 64 Iowa 140-3.
Jenkins vs. Neff, 46 U. S. L. Ed. 1140.
Barney vs. City of New York, 193 U. S. 430-8.
Ft. Madison Co. vs. Maxwell, 202 Iowa 1346.

V.

Petitioner is not claiming any title, right, privilege or immunity within the meaning of Judicial Code Section 237. There can be no right, privilege or immunity, to be taxed im-

properly and contrary to law and in a less amount than the law provides, because some one else is improperly and contrary to law taxed in a less amount than he should be on account of the illegal and improper acts of a ministerial official, such as the county auditor in this case. Petitioner is not claiming that the provisions of the law as to its taxation have not been properly carried out, it admits that they have. What it is claiming is that because certain other persons, who it claims were in competition with it, were allowed by the illegal acts of the county auditor to be taxed at a less rate than the law required, then petitioner should also be allowed to escape a part of its taxes, contrary to law. Thus adding to the wrong already committed against the taxpayers who have been legally taxed and who must make up and pay the taxes escaped by the petitioner and other persons illegally taxed in too small an amount. Certainly no privilege or immunity, under the Constitution of the United States could arise under this state of facts. The Constitution is a shield, and is not for the purpose of perpetuating and increasing a wrong already committed, or to put people on an equal basis by allowing them all to commit the same wrongs. The following case supports this proposition:

State vs. Hall, 54 Southern 560.

VI.

The petitioner is not entitled to certiorari where the decision of the state court rests even in part on a question of state practice, or on the question of having pursued the wrong remedy. The Supreme Court of Iowa in this case partly at least rested its decision on the ground that petitioner's remedy was by appeal to the board of review, and thence to the District Court, and not by mandamus, therefore petitioner has no right to have that question reviewed by this Honorable Court.

The following cases support this proposition:

Eustis vs. Bolles, 150 U. S. 361-70.
Mo. Pac. Ry. Co. vs. Fitzgerald, 160 U. S. 556.
Griswold Land & Credit Co. vs. Calhoun Co., 198 Iowa 1240.

VII.

Petitioner is a state bank, organized under and subject to the laws of the State of Iowa, it therefore cannot claim any rights or privileges under Section 5219 of the Revised Statutes of the United States which applies only to National Banks. Petitioner has no rights here unless it can claim some violation of the 14th Amendment to the United States constitution. Petitioner is however a creature of the state and subject to its laws. It may be deprived of its entire existence by the State that created it, and its rights may be limited and abridged by the state at any time. Even if what the auditor did as complained in this case, in assessing individuals in competition with petitioner at a lower rate, was the law of the state and had been done pursuant thereto, there would be no violation of the constitution as to petitioner, because different classes of people can be taxed at different rates if there is a reasonable classification. The state in creating a bank may provide that if it decides to accept a charter and become a bank, as a condition thereto it shall be taxed at a certain rate, different from other persons or corporations and there would of course be no violation of the constitution. Petitioner as a state bank therefore has nothing to complain of.

The following cases support this proposition:

Layman vs. Telephone Co., 123 Iowa 591-600.
Primghar State Bank vs. Rerick, 96 Iowa 238-42-4.
Bells Gap Ry. vs. Commonwealth, 134 U. S. 232.
Pac. Ex. Co. vs. Seibert, 142 U. S. 339.
Giozza vs. Tierman, 148 U. S. 567.

The provisions of the Code of Iowa of 1927 on this matter are as follows:

> 8376. Legislative control. The articles of incorporation, by-laws, rules and regulations of corporations hereafter organized under the provisions of this title, or whose organization may be adopted or amended hereunder, shall at all times be subject to legislative control, and may be at any time altered, abridged or set aside by law, and every franchise obtained, used, or enjoyed by such corporation may be regulated, withheld, or be subject to conditions imposed upon the enjoyment thereof, whenever the general assembly shall deem necessary for the public good.

The respondents therefore respectfully submit there is no occasion for a writ of certiorari, the petitioner has had its day in court and has had due process of law. The decision of the Iowa Supreme Court should remain the law of the case.

Respectfully submitted,

MAXWELL A. O'BRIEN,
ESKIL C. CARLSON,
Attorneys for Respondents,
With whom are
CHAS. HUTCHINSON, AND
GEORGE A. WILSON,
Of Counsel.

APPENDIX.

CERTIFICATE OF CLERK OF SUPREME COURT OF IOWA.

IN THE SUPREME COURT OF IOWA.

Central State Bank, *Appellant*,
vs.
J. M. Stewart, Chairman of the Board of Supervisors of Polk County, Iowa, C. W. Keller, Frank Thornton, C. F. Keeling and E. R. Bennett, members of and constituting the Board of Supervisors of Polk County, Iowa, J. G. Cook, County Auditor of Polk County, Iowa, and Allen Munn, County Treasurer of Polk County, Iowa, *Appellees*.

In Equity.

CERTIFICATE OF RECORD.

To The Supreme Court of the United States:

I, B. W. Garrett, Clerk of the Supreme Court of the State of Iowa, hereby certify that in the above entitled cause, an appellees' Notice of Intention to Petition for Rehearing was filed in my office on the 25th day of October, 1930, which said appellees' Notice, together with the acceptances of service thereon, reads in words and figures, as follows, to-wit:

"To the Appellant, Central State Bank, and to Gamble, Read and Howland, its attorneys, and to B. W. Garrett, Clerk of the Supreme Court of the State of Iowa:

You are hereby notified that the appellees in the above entitled cause intend to file a petition for rehearing in the above entitled cause within sixty (60) days after the filing of the opinion of the Supreme Court of Iowa therein.

MAX O'BRIEN,
CARL MISSILDINE,
GEO. A. WILSON,
ESKIL CARLSON,
CHAS. HUTCHINSON,
Attorneys for Appellees.

Service of the above and foregoing Notice of Intention to petition for rehearing is hereby accepted and receipt of copy acknowledged at Des Moines, Iowa, this 25th day of October, 1930.

GAMBLE, READ & HOWLAND,
Attorneys for Appellant.

Service of the above and foregoing Notice of Intention to Petition for Rehearing is hereby accepted and the same filed in my office this 25th day of October, 1930.

B. W. GARRETT,
Clerk of the Supreme Court of Iowa."

And on the 27th day of October, 1930, in the said matter, there was filed in my office an Appellant's Notice of Intention to Petition for Rehearing, a copy of which Appellant's Notice, together with the acceptances of service thereon, reads in words and figures, as follows, to-wit:

"To the Appellees, J. M. Stewart, Chairman of the Board of Supervisors of Polk County, Iowa, C. W. Keller, Frank Thornton, C. F. Keeling and E. R. Bennett, members of and constituting the Board of Supervisors of Polk County, Iowa, State of Iowa, and to George A. Wilson, John Fletcher, Attorney General, Maxwell A. O'Brien, Assistant Attorney General, Eskil Carlson, Charles Hutchinson, Carl Missildine, Attorneys for Appellees; to J. G. Cook, County Auditor of Polk County, or to Eskil C. Carlson, his attorney; to Allen Munn, County Treasurer of Polk County, or to Charles Hutchinson, his attorney; and to B. W. Garrett, Clerk of the Supreme Court of the State of Iowa:

Please take notice that the appellant in the above entitled cause, Central State Bank, will petition for a rehearing and will, within sixty days after the filing of the opinion of the Supreme Court of Iowa, dated September 26th, 1930, file in the office of the Clerk of said court, its petition for rehearing. Said petition for rehearing will pray that the opinion filed in the office of the Clerk on September 26, 1930, be set aside and that a rehearing be granted.

GAMBLE, READ & HOWLAND,
Attorneys for Appellant.

Service of the above and foregoing Notice of Intention to Petition for Rehearing is hereby accepted and receipt of copy acknowledged at Des Moines, Iowa, this 27th day of October, 1930.

C. S. MISSILDINE, *Co. Atty.*
by C. A. B. Asst.
CHAS. HUTCHINSON,
GEO. A. WILSON,
ESKIL C. CARLSON,
JOHN FLETCHER,
MAXWELL A. O'BRIEN,
Attorneys for Appellees

Service of the above and foregoing Notice of Intention to Petition for Rehearing is hereby accepted and the same filed in my office this 27th day of October, 1930.

B. W. GARRETT,
Clerk of the Supreme Court of Iowa."

I hereby further certify that the foregoing copies are full, true, correct and complete copies of the appellees' Notice of Intention to Petition for Rehearing and appellant's Notice of Intention to Petition for Rehearing, filed in said matter; and there is no further record whatsoever in this Court relative to or on either of the said appellees' Notice of Intention to Petition for Rehearing or appellant's Notice of Intention to Petition for Rehearing, and no petitions for rehearing were filed.

WITNESS my official signature and the Seal of the Supreme Court of the State of Iowa, at Des Moines, Polk County, Iowa, this 4th day of March, A. D., 1931.

SEAL

B. W. GARRETT,
Clerk of the Supreme Court.

FILE COPY

FILED
JUL 7 1931
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM 1930.

~~1930 Term No. 712~~

1931 Term No. 16

CENTRAL STATE BANK, *Petitioner,*

vs.

E. R. BENNETT, Chairman of the Board of Supervisors of Polk County, Iowa, et al., *Respondents.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA.

BRIEF OF RESPONDENTS.

ESKIL C. CARLSON,
MAXWELL A. O'BRIEN,
Des Moines, Iowa,
Attorneys for Respondents.

GEORGE A. WILSON,
CHAS. HUTCHINSON,
on the brief.

INDEX.

Brief of Respondents ---------- Page.
Facts as to this Court's Jurisdiction ---------- 1
Concise Statement of Case ---------- 2
The Issues ---------- 4
Statement of Petition ---------- 4
Statement of Answer ---------- 4
Trial Before Polk County Iowa District Court ---------- 10
Concise Statement of Facts ---------- 13
As to Whether there was Competitive Capital ---------- 13
Alleged Competing Corporations ---------- 14
Security Loan & Investment Co. ---------- 15
Iowa Investment Mortgage Co. ---------- 16
Central Iowa Joint Stock Land Bank ---------- 17
Des Moines Morris Plan Co. ---------- 18
Continental Securities Co. ---------- 19
Iowa Guaranty Mortgage Corporation ---------- 20
Federal Cattle Loan Society ---------- 21
Garner Investment Co. ---------- 23
Jesse F. Stevenson & Co. ---------- 24
Farmers Bond & Mortgage Co. ---------- 25
Motor Finance Co. ---------- 27
Union Mortgage & Cattle Loan Co. ---------- 28
Bond & Mortgage Company of Iowa ---------- 29
Manning Martin Co. ---------- 30
Des Moines Joint Stock Land Bank ---------- 32
First & Second Mortgage Corporation ---------- 33
Continental Mortgage & Loan Co. ---------- 34
Des Moines Discount Co. ---------- 35
Bankers Mortgage Co. ---------- 35
United Mortgage Loan Co. ---------- 36
Merchants Loan & Inv. Co. ---------- 36
State Bond Co. ---------- 37
Polk County Mort. Co. ---------- 38
Corn Belt Land & Loan Co. ---------- 38
Guarantee Mtg. & Fin. Co. ---------- 39
Nat'l. Inv. & Fin. Co. ---------- 40
Burns Bros. Co. ---------- 41
Burns Bros. Inc. ---------- 41
Banking Business of Petitioner ---------- 41
Summary of Argument ---------- 43
I Under pleadings and facts mandamus not maintainable ---------- 45
II Petitioner's remedy was by appeal to local Board of Review ---- 48
III Acts of taxing officer, even if erroneous or illegal, fall far short of being "deliberate, intentional and wilful acts" as to constitute a violation of Sec. 5219—U. S. Rev. Stat. ---------- 49
IV Where state law not in violation of Sec. 5219—but administration is complained of—moneyed capital competition must be as to complaining bank—and in competition with material or substantial part of ordinary and legitimate banking business of complaining bank ---------- 50
V Corporations taxed on moneys and credits could not constitute competition because Sec. 5219 provides "moneyed capitals in hands of individual citizens" must be taxed same as National banks, corporations not "individual citizens" ---------- 51
VI National banks being restricted as to character and locality of real estate loans they could make, in order to establish competition, bank must show loans could have been made by a National Bank ---------- 52

VII There is no discrimination shown between State Bank and other corporations and individuals as to constitute violation of either State or Federal Constitution. The State Banks are creatures of the state and as such have only rights conferred by state ----52

VIII Erroneous or even illegal individual acts of taxing officials in no event become a violation of the Constitution to be reviewed and relief obtained by certiorari. The Auditor could have corrected the error but was not requested so to do----53

IX Previous appeals from Board of Review taken by petitioner and suits brought in Federal Court and dismissed constitute adjudications. All objections in this suit either were or could have been raised in those appeals and suits----54

X Taxes complained of not illegal and at most only erroneous. Payment cannot be recovered unless paid under particularly stated protest, which was not done ----54

XI The banks were guilty of laches and are by acts and omissions estopped to make the claims they are now making. Not protesting for years, making no request of Auditor to correct error, appealing from erroneous assessments but not raising present questions, allowing taxes to be distributed to taxing bodies without protest or objections, signing assessment roll and agreeing to pay taxes without objections except as to U. S. Bonds, bringing suit, raising the questions herein, and then dismissing and paying taxes, and many stockholders in complaining banks being stockholders in alleged competing corporations, constitute laches ----54

XII The bank is not in equity with clean hands. They have systematically assisted customers in avoiding taxes, have combined to unlawfully decrease interest rate charged to them and to make a charge for carrying small accounts ----55

XIII Banks not real parties in interest. If improperly taxed it was stockholders not banks. Banks not entitled to represent them. Present stockholders different than at time of alleged wrongful levy. Defect in parties ----55

XIV No discrimination as against banks; because five mill levy properly applied would exceed tax complained of ----56

XV Actions barred by statute of limitations ----56

XVI No evidence on which to base recovery for taxes assessed as of January 1, 1919, and the 1922 evidence is immaterial ----57

XVII Petitioners have not exhausted remedy before Supreme Court of Iowa ----57

XVIII Decree and judgment of Supreme Court of Iowa not final and enforceable and petitioners have no right to certiorari to this Court ----58

Argument ----59

APPENDIX.

TABLE OF TEXTBOOKS

13 Corpus Juris 444, Section 381 ---------- 167
38 Corpus Juris 770, Section 412 ---------- Quoted 168—Cited 47-76
37 Cyc. 1187 ---------- Cited 148
27 Cyc. 1131 ---------- Cited 76
Ferris on Extraordinary Legal Remedies, Section 206 ---------- Cited 46-47-64
Ferris on Extraordinary Legal Remedies, Section 191 ---------- Quoted 69
Ferris on Extraordinary Legal Remedies, Section 299 ---------- Quoted 69
High on Extraordinary Remedies, Volume 1, Section 288, Sections 121-299 Page 50, Sections 42 and 43 ---------- Quoted 67-68—Cited 47-67
Section 141 ---------- Quoted 168—Cited 68
Morse on Banks and Banking (5th Ed.) Volume 1, Section 59 Note 4 ---------- Cited 50

TABLE OF STATUTES:

Set Out
Iowa Code 1913 Supplement, Section 1366 ---------- 168
Iowa Code 1897, Section 1359 ---------- 169
Iowa Code 1897, Section 1323 ---------- 169
Iowa Code 1897, Section 1417 ---------- 170
Iowa Code 1927, Section 7235 ---------- 170
Iowa Code 1924, Section 12440 ---------- 170
Iowa Code 1924, Section 12441 ---------- 171
Iowa Code 1927, Section 12452 ---------- 171
Iowa Code 1927, Section 12456 ---------- 171
Iowa Code 1924, Section 7149 ---------- 171
Iowa Code 1924, Section 6992 ---------- 171
Iowa Code 1924, Section 11007 ---------- 172
Iowa Code 1927, Section 12880 ---------- 173
Iowa Code 1927, Section 8736 ---------- 124
Iowa Code 1927, Section 12881 Subd. 4 ---------- 173
Iowa Code 1927, Section 12883 ---------- 173
Rule 27, Supreme Court of Iowa ---------- 173
Iowa Constitution, Sec. 12, Art. VIII ---------- Quoted 124—Cited 124

TABLE OF CASES:

Andrew, Supt. v. Munn, Treas., 218 N. W. 526; 205 Iowa 723 ---------- 56-149
Addison v. Lowden, 222 N. W. 406 (Iowa) ---------- 67
Andrews v. Virginia Ry. Co., 248 U. S. 272 ---------- 58-161
Bank v. Chapman, 173 U. S. 205 ---------- 52-122
Bank v. Board of Supervisors, 168 Iowa 501 ---------- 62
Barney v. City of New York, 193 U. S. 430 ---------- 53-129
Bells Gap R. R. v. Commonwealth, 134 U. S. 232 ---------- 53-123
Benjamin v. District Township, 50 Iowa 648 ---------- 66
Bibbins v. Clark & Co., 90 Iowa 230 ---------- 45
Blondel v. Woodbury Co., 212 N. W. 335; 203 Iowa 1099 ---------- 54-132
Board v. First Nat'l Bank, 57 N. E. 778 (Ind.) ---------- 56-149
Brownley v. Marion Co., 53 Iowa 487 ---------- 45
California Bank v. Kennedy, 167 U. S. 362 ---------- 51
Charlotte Ry. Co. v. Gibbs, 142 U. S. 386 ---------- 53-126
Charles City v. Ramsey, 199 Iowa 722 ---------- 67
Chester v. Penn, 134 U. S. 240 ---------- 53-126
Chi., Grt. W. R. R. Co. v. Basham, 249 U. S. 164 ---------- 58
Citizens Bank v. Opperhiman, 249 U. S. 448 ---------- 58-161
Citizens Bank v. Johnston, 202 N. W. 382 (Iowa) ---------- 108
Clark v. Board of Directors, 24 Iowa 266 ---------- 46-65-66
Collins v. Board of Supervisors, 158 Iowa 322 ---------- 47-71
Cressler v. Brown, 192 Pac. 417. (Oklahoma) ---------- 54-137
Davenport Nat'l Bank v. Board, 64 Iowa 140 ---------- 49-102

Davenport Nat'l Bank v. Board, 123 U. S. 83 50-51-102
Des Moines Nat'l v. Fairweather, 68 (U. S.) 190 L. Ed. 50
Des Moines Nat'l v. Fairweather, 191 Iowa 1240 52
Dickey v. Polk County, 58 Iowa 287 45
District Twp. Spencer v. District Twp. Riverton, 56 Iowa 85 62
Eder v. Fink, 180 N. W. 542 (Minn.) 54-137
Everly v. Jasper County, 72 Iowa 149 62
Evansville Nat'l Bank v. Britton, 105 U. S. 322 92
Farmers Ins. Co. v. Linn Co., 202 Iowa 444 55-138
Farmers Mer. Nat'l Bk. v. Smith, (C. C. A.) 77 Fed. 129 51
Farmers Nat'l Bk. v. Hoffman, 193 Iowa 119 56-150
Farson v. Baird, 63 Law Ed. 233 47-77
Felinciana (In re) Bk. & Tr. Co., (La.) 78 So. 169 56
Finman v. Hughes Co., (S. D.) 225 N. W. 711 55-56
First Nat'l Bank v. Anderson, 269 U. S. 341 49-78-87-91
First Nat'l Bank v. Anderson, 192 N. W. 6, (Iowa) 52-105-106
First Nat'l Bank v. Anderson, 70 (U. S.) L. Ed. 171 50-107-111
First Nat'l Bank v. Anderson, 192 N. W. 98; 196 Iowa 587 50-102-120
First Nat'l Bank v. Board of Review, 201 N. W. 769; 199 Iowa 1124 48-50-52-53-79-105-107
First Nat'l Bank v. Board of Review, 204 N. W. 223; 200 Iowa 131 48-50-79-115
First Nat'l Bank v. Chehalis, 166 U. S. 440 50-51-103-107-122
First Nat'l Bank v. Council Bluffs, 182 Iowa 107 52-56-149-150
First Nat'l Bank v. Hartford, 47 Sup. Ct. Rep. 462 52-83-84-87-91-112
First Nat'l Bank v. Hayes, 186 Iowa 892 53
First Nat'l Bank v. Patterson, 176 Pac. 498 (Colo.) 56-149
First Nat'l Bank v. Weber, 196 Iowa 1155 53-81-129
Ft. Madison Sec. Co. v. Maxwell, 202 Iowa 1346 53-128
Ford v. McGregor, 23 Pac. 508 (Nevada) 61
Gaffney v. Young, 200 Iowa 1030 48-72-73
Georgetown Nat'l Bank v. McFarland, 273 U. S. 568 50-102
Giozza v. Tierman, 148 U. S. 657 53-123-126
Griebel v. Board of Supervisors, 202 N. W. 379; 200 Iowa 143 46-65-66
Griswold Land Co. v. Calhoun County, 188 Iowa 1240 48-79
Hawkeye Ins. Co. v. French, 109 Iowa 585-90 52
Hawkeye Co. v. Marian, 110 Iowa 468 54-139
Head v. Board, 170 Iowa 300 50-56-103-149-150
Hendrickson v. Apperson, 245 U. S. 105 49
Hendrickson v. Creager, 245 U. S. 115 49
Hershire v. First Nat'l Bank, 35 Iowa 272 56
Home Ins. Co. v. New York, 134 U. S. 594 53-126
Home Sav. Bank v. District Court, 121 Iowa 1 48-72-73
Insurance Assn. v. Gilbertson, 129 Iowa 658 127
Interstate Com. Com. v. Merchant Ass'n., 65 L. Ed. 112 47-70
Iowa Mut. Tor. Ins. v. Gilbertson, 129 Iowa 658 53
Iowa National Bank v. Stewart, 232 N. W., 445 (Iowa) 48
Iowa Ry. Land Co. v. Woodbury Co., 64 Iowa 212 47-62-76
Jasper Co. Sav. Bk. v. Board, 202 N. W., 387 (Iowa) 50-108
Jenkins v. Neff, 46 U. S. 1140 (L. Ed.) 49
Jennings v. Coal R. Imp. Co., 147 U. S. 147 53-126
Jewett v. Ayres, 167 Iowa 431 48-72
Lamont Sav. Bank v. Luther, 200 Iowa 180 48-54-79
Langhart v. First Nat'l Bk., 191 Iowa 957 53
Layman v. Telephone Co., 123 Iowa 591 52-123-124
Littell v. Webster County, 152 Iowa 206 47-71
Manning Bank v. Armstrong, 204 Iowa 512 50-103
Mercantile Nat'l Bank v. Hubbard, 98 Fed. 465 50
Mercantile Nat'l Bank v. N. Y., 121 U. S. 138 115-122
Meyer v. Dubuque County, 43 Iowa 592 67
Merchant's National v. Richmond, 256 U. S. 635 52-91-103-106

Milwaukee Malt Ex. Co. v. C. R. I. & P., 73 Iowa 98 ---------- 65
Murphy v. Supervisors, 215 N. W. 744; 205 Iowa 256 ---------- 56-158
Missouri v. Duckery, 191 U. S. 165-70 ---------- 127
Munn v. Des Moines National Bank, 18 Fed. (2d) 269 ---------- 163
Nelson v. First Nat'l Bank, 42 F. (2d) 30 (C. C. A. 8th) ---------- 48
Ohio River Co. v. Fisher, 115 Fed. (C. C. A.) 929 ---------- 58
Pacific Ex. Co. v. Seibert, 142 U. S. 339 ---------- 53-123-126
People v. Doty, 80 N. Y. 225 ---------- 51-52-122
People Ex. Rel. v. Goldfogle, 205 N. Y. S. 870; 211 N. Y. S. 85; 152 N. E. 418 ---------- 50
People Ex. Rel. v. Peabody, 211 N. Y. S. 114 ---------- 50
People Ex. Rel. v. Goldfogle, 151 N. E. 452, (N. Y.) ---------- 51
Perkins v. Smith, 23 N. E. 21-3, (N. Y.) ---------- 51-52-122
Perry v. Board of Supervisors, 133 Iowa 281 ---------- 66
Pierce v. Nat'l Bank of Commerce, 268 Fed. 487 ---------- 54-137
Poweshiek Sav. Bk. v. Johnston, 202 N. W. 384; 199 Iowa 555 ---------- 50-108
Prim v. Fort, 57 S. W. 972 (Texas) ---------- 51-122
Prim v. Fort, 57 S. W. 86 (Texas) ---------- 51-122
Preston v. Board of Ed., 124 Iowa 355 ---------- 46-65-66
Primghar State Bank v. Rerick, 96 Iowa 238 ---------- 52-56-123
Railway Company v. Patterson, 154 U. S. 130; 14 S. Ct. 977 ---------- 49-78
Redhead v. Iowa Nat. Bk., 127 Iowa 572 ---------- 56-149
Reinkey v. Wilkins, 179 N. W. 751, (Wisconsin) ---------- 54-137
Rankin v. Noel, Co. Commissioner, 185 S. W. 883 (Texas) ---------- 48-71
Rice v. Walker, 44 Iowa 458 ---------- 47-76
Richards v. Wapello Co., 48 Iowa 507 ---------- 45
Ridley v. Doughty, 77 Iowa 226 ---------- 53
Ridley v. Doughty, 85 Iowa 418 ---------- 53-129
Riley v. City of Des Moines, 212 N. W. 716; 203 Iowa 1240 ---------- 46-48-65-67-72
Sarby v. Morey, 221 N. W. 492; 207 Iowa 521 ---------- 46
Scripture v. Burns, 59 Iowa 70 ---------- 47-70
Slimmer v. Chickasaw Co., 140 Iowa 448 ---------- 55-137
South Dakota/Sec. N. Bk. v. Twindle, 217 N. W. 542 (S. D.) ---------- 54-138
Stapylton v. Haggard, 91 Fla. 93 ---------- 56
State v. Thomas, 152 Iowa 500 ---------- 66
State v. Hall, 54 So. 560 ---------- 118
State ex rel. Relief Ass'n v. Mayor, 118 Atl. 640 (Delaware) ---------- 48-71
State v. Parker, 147 Iowa 69 ---------- 66
Stickney v. Bangor, 30 Me. 404 ---------- 56-149
State v. First Nat'l Bank, 71 L. Ed. 744 ---------- 112
Sullivan v. Robbins, 109 Iowa 235 ---------- 47-71
Sweitzer v. Fischer, 172 Iowa 266 ---------- 66
Taylor v. Taylor, 240 S. W. 6 (Arkansas) ---------- 54-137
Universal Loan Corp. v. Board of Review, 219 N. W. 536; 205 Iowa 1391 ---------- 51
U. S. Express Co. v. Ellyson, 28 Iowa 370 ---------- 52-125
Village of Winnetka v. Handy, 128 N. E. 805, (Ill.) ---------- 54-137
Warren v. Henly, 31 Iowa 31 ---------- 53
Waterloo Trans. Co. v. Supervisors, 131 Iowa 237 ---------- 52
Welfare Loan Soc. v. Des Moines, 219 N. W. 534; 205 Iowa 1400 ---------- 51
Woodbury Co. v. Talley, 147 Iowa 498 ---------- 47-48-65-67-72-74
Woodcock v. Board of Education, 10 A. L. R. 181 ---------- 47-76

Supreme Court of the United States

OCTOBER TERM, 1931.

1930 Term No. 712
1931 Term No. 16

CENTRAL STATE BANK, *Petitioner,*

vs.

E. R. BENNETT, Chairman of the Board of Supervisors of Polk County, Iowa, et al., *Respondents.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA.

BRIEF OF RESPONDENTS.

I.

OPINION OF COURT BELOW.

This cause was decided by the SUPREME COURT OF IOWA, on September 26, 1930, and is reported as Iowa National Bank v. Stewart, et al., and six other cases, in the 232 Northwestern Reporter, page 445-470, both inclusive. The case has not as yet been published in the official Iowa Reports.

The opinion is set out in full, including the dissenting opinion in the printed record at pages 1339 to 1397.

II.

FACTS AS TO THIS COURT'S JURISDICTION.

We believe the petitioners have not complied with paragraph 1 of Rule 12 nor with paragraph c Section 2 of Rule 27 of this court. Therefore we give this as a concise statement as to why the jurisdiction of this court cannot be invoked.

This action was begun by filing a petition in the District Court of Iowa in and for Polk County, March 13, 1926, (R. 5). The issues were drawn in that same court and tried in that court before Honorable O. S. Franklin, one of the judges of that Court, November 7, 1927 (R. 171), and the decree and judgment was entered in that Court November, 26, 1928 (R. 107).

From this decree and judgment the appeal was taken to the Supreme Court of Iowa (R. 1339) and the Supreme Court of Iowa affirmed the lower Court September 26, 1930. (R. 1341) 232 N. W. 445. Following this, on October 27, 1930, the petitioners served on these respondents (Appellees in Iowa Supreme Court) their Appellant's Notice of Intention to Petition for Rehearing. (R. 1410) and on the same date—October 27, 1930, the petitioners-appellants there—filed the said Appellant's Notice of Intention to Petition for Rehearing together with acceptances of service thereon in the office of the Clerk of the Supreme Court of Iowa. (R. 1409).

There is no further record as to the Notice of Intention to Petition for Rehearing. (R. 1411).

It is from the action of the Supreme Court of Iowa, that the petitioner seeks relief through the Writ of Certiorari. (Petition for Writ—Page 28.)

In the District Court of Polk County,—the trial court—the issues raised among other things were these procedure and jurisdictional questions.

Plaintiff—petitioner here—has a plain speedy, adequate remedy at law.

Remedy, if any, is by appeal to Board of Review.

Mandamus will not lie.

(Par. 6 of Answer. R. 32).

Matter was adjudicated by Board of Supervisors and appeal only remedy. (Par. 2-3 of Division II of Answer. R. 44.)

Matter was adjudicated by action brought in Federal Court and dismissed (Par. 6—Division II of Answer. R. 48).

That by stipulation plaintiff was bound by results and adverse adjudication of Des Moines National Bank v. Fairweather. (Par. 7—Division II of Answer. R. 49).

The Supreme Court of Iowa in this cause held:

> "As to the first class of competing capital, the plaintiffs had an available remedy by appeal to the board of review and further appeal from the board of review to the district court, a remedy to which they resorted, though they did not therein ask for correction on account of the alleged discrimination of which they now complain." (R. 1346). * * * as to competing capital of individuals and foreign corporations, this remedy was available to the plaintiff to correct errors of which they now complain." (R. 1347).
>
> * * * "As to the alleged discrimination in favor of moneyed capital held by individual taxpayers and foreign corporations, the remedy afforded before the board of review and by appeal was available adequate and exclusive." (R. 1348).

The plaintiff-petitioner here—was bound by the adverse decision and judgment in Des Moines National Bank vs. Fairweather, 191 Iowa 1240, 181 N. W. 459, 184 N. W. 313, and on writ of error to the Supreme Court of the United States, 263 U. S. 103, 44 S. Ct. 23, 68 L. Ed. 191, by virtue of a stipulation to "abide the final judgment" in that, then pending, case, and accordingly in plaintiff's case there was entered

"This case is hereby dismissed by plaintiff * * * in accordance with stipulation." (R. 1214).

CONCISE STATEMENT OF CASE.

To be concise in this case is even to appear to be lengthy because of the large record. This statement cannot avoid both statements of issues of law and issues of facts, the proper conclusion of law and fact both being issues.

The nature of the action is not as stated by petitioners (p. 1153), but, we insist, this is an action in mandamus brought by the National Banks against the members of the Board of Supervisors and the County Auditor and County Treasurer of Polk County, Iowa, to compel refunds of certain taxes for the years 1919 to 1922 inclusive, alleged to be the difference between the amounts correctly paid and less amounts they would have been required to pay had there been applied to them certain illegal classification or rates applied to competing individuals and corporations for the same years.

Because we believe accuracy requires a presentation of the issues, as we see them, we submit this statement of,—

THE ISSUES.

On March 13, 1926, the Iowa National Bank, petitioner, filed its PETITION in the District Court of the State of Iowa, in and for Polk County, Iowa, alleging

Plaintiff is a national bank in the banking business in the City of Des Moines, Polk County, Iowa. Defendants are J. M. Stewart, the chairman and the four other members of the Board of Supervisors, the Auditor, and the Treasurer, all Polk County officers.

This is an action in mandamus for an order upon the defendants in their capacities as members of the Board of Su-

pervisors of Polk County, Iowa, and County Auditor and County Treasurer of said county respectively, directing the said defendants and each of them to refund to the plaintiff herein certain taxes erroneously and illegally exacted of the plaintiff by the said defendants, and by the taxing officers of Polk County, State of Iowa, in the amounts hereinafter specified.

"Plaintiff brings this action for itself and in behalf of its stockholders for the purpose of enforcing a duty enjoined upon the defendants in their official capacities." (R. 6).

That the City Assessor in and for each of the years fixed an assessment against the shares of stock of petitioner—corporation, as follows:

1919	$2,024,957.00
1920	2,039,915.00
1921	2,065,606.00
1922	1,902,783.00

under the heading "corporation stock" upon Form 1 of assessor's roll. The assessment was sustained by the City Council of the City of Des Moines sitting as a board of review.

That the consolidated levy each year and the tax imposed against the shares of stock in plaintiff company were, as follows:

1919—	Consolidated	Levy—	137.8	mills	on 20%	value—	$55,807.62
1920—	"	"	—127.	mills	" "	"	— 64,053.64
1921—	"	"	—164.	mills	" "	"	— 67,751.68
1922—	"	"	—160.4	mills	" "	"	— 61,341.68

That the shares of stock in each of the years was subject to taxation only as provided in Section 5219 of the Revised Statutes of the United States.

That during the years 1919, 1920, 1921 and 1922, the "assessors and taxing officers of Polk County" included in the

tax lists as "moneys and credits" assessments of shares of stock in various corporations engaged in business of loaning money, notes of individuals payable on demand and otherwise, including notes secured by mortgages upon real estate and upon chattel property, and property pledged as collateral, debenture bonds, bills of exchange, circulating notes of national banking associations and other United States legal tender, notes and other securities, being assessments aggregating

For the year 1919—$24,878,698.00
" " " 1920— 48,961,990.00
" " " 1921— 53,024,705.00
" " " 1922— 49,930,861.00

That "the city assessor of the City of Des Moines and the taxing officials of Polk County" habitually, intentionally, systematically and generally included in assessments of moneys and credits assessments against individuals representing money at interest, including notes, bonds, mortgages representing loans of money, and all other securities and evidences of indebtedness that normally enter into banking business and as come into direct competition with banking capital in the loan market of Polk County, Iowa.

That the "taxing officers of Polk County" did habitually, intentionally, systematically and generally include in the total of moneys and credits taxed at 5 mills on the dollar large sums representing the assessed value of shares of stock of corporations engaged in the business of loaning money, in the purchase and sale of notes, mortgages, bonds, discounting commercial paper, in direct competition with national and state banks in the loan market in Des Moines, said corporations being assessed for

1919—$2,000,000.00
1920— 5,500,000.00
1921— 7,000,000.00
1922— 7,000,000,00

That the assessments against such individuals were for

1919—$1,700,000.00
1920— 2,500,000.00
1921— 2,500,000.00
1922— 2,500,000.00

As a result the tax levied under the consolidated levy, instead of what would have been under the 5 mill levy as follows:

1919—	Consolidated—	$55,807.62—	5	mill—	$10,124.79
1920—	"	64,053.64—	"		10,199.58
1921—	"	67,751.68—	"		10,328.03
1922—	"	61,341.68—	"		9,513.92

That the assessments of the corporations in each instance in each year was made upon assessment roll No. 1, listed under the sub-heading "Corporation stock", that the assessment so appeared upon the assessor's roll when presented to the City Council as a Board of Review, and that the assessments were by the assessor and the board of review classified identically as were the assessments of shares of stock of the plaintiff, "and long after the Board of Review had adjourned in each of said years" the assessments of the corporations were placed upon the tax lists "by the taxing officers" as "moneys and credits", and applied a tax at the rate of 5 mills upon the dollar while the shares of stock of plaintiff were taxed at consolidated levy.

That the "higher" rate was prohibited by U. S. Code, Section 5219.

That plaintiff was discriminated against contrary to the provisions of the Iowa Constitution Section 6, Article I, and Section 2, Article VIII, and the 14th Amendment to the United States Constitution.

That in each year the plaintiff appeared before and filed objections to the amount of the assessment because the dollar-

ing the years 1919, 1920, 1921 and 1922 by reason of the intentional, deliberate, systematic and general failure of the taxing officers of Polk County and State of Iowa to follow the provisions of Sections 1310 and 1322-1a of the 1931 Code Supplement in the administration of the taxing laws the plaintiff was discriminated against, and was required to bear an undue and discriminatory portion of the tax burdens of the City of Des Moines, Polk County, State of Iowa, contrary to the provisions of the Constitution of the State of Iowa and of the 14th Amendment to the Constitution of the United States as hereinbefore alleged. That such unlawful action of the taxing officers of Polk County, State of Iowa, constituted an unjust and unlawful discrimination in favor of the shares of stock of competing corporations and moneyed capital in the hands of individual citizens, and in favor of the shares of national banks and banking associations as against the shares of the plaintiff. That such deliberate, systematic, intentional and general course of action in the administration of the tax laws imposed an unwarranted and illegal discrimination against the plaintiff and its stockholders in violation of Section 6, Article I of the Constitution of the State of Iowa in that by such action and course of conduct upon the part of the taxing officers of Polk County, State of Iowa, there was granted to the owners of moneyed capital and corporation stock, privileges and immunities which, upon the same terms, were denied to the plaintiff and its stockholders. That such course of action and conduct in the administration of the tax laws by the taxing officers of Polk County was in violation of Section 2, Article VIII of the Constitution of the State of Iowa in that the property of the plaintiff and its stockholders was subjected to taxation at a higher rate than the property of individuals of the same class and character as that of the plaintiff and its stockholders. That such course of conduct in the administration of the tax laws by the taxing officers of Polk County, State of Iowa, constituted a vio-

lation of Section 1 of the 14th Amendment to the Constitution of the United States in that it deprived the plaintiff and its stockholders of property without due process of law, and denied to the plaintiff and its stockholders the equal protection of the law, and that thereby there was cast upon the plaintiff and its stockholders an undue and unjust proportion of the burdens of taxation in the taxing district of the City of Des Moines, Iowa.

That on November 28, 1923, the plaintiff tendered the County Treasurer in payment of taxes at 5 mills, as follows:

For 1919—on	$2,024,975.00	plus 6%	from Mch 30,	1921—	total—	$12,349.96
1920— "	2,039,915.00	"	"	"	"	"	"	11,829.10
1921— "	2,065,606.00	"	"	"	1922—	"	11,353.99
1922— "	1,902,783.00	"	"	"	1923—	"	9,892.29
							$45,425.34

and the tender was refused.

That the treasurer demanded plaintiff pay taxes upon its shares at the consolidated levy rate with interest and penalties, and threatened enforcement with seizure and sale of plaintiff's property. To prevent the sale and accumulation of penalties, November 30, 1923, plaintiff under written protest paid the county treasurer

For 1919	Taxes	$55,807.62	Penalties	$25,113.43
1920		64,053.64		24,340.38
1921		67,751.68		17,615.44
1922		61,341.68		4,907.33

September 15, 1925, plaintiff filed a written demand with the County Auditor and Board of Supervisors for the return of taxes "illegally and erroneously" exacted from plaintiff for the years 1919, 1920, 1921, 1922. No refund has been made or ordered and no action on the demand taken.

Plaintiff is without speedy and adequate remedy at law

and without mandamus plaintiff will sustain great irreparable injury.

WHEREFORE, plaintiff prays "for itself and in behalf of its stockholders" a writ of mandamus ordering defendants to refund the plaintiff the following sums for taxes, interest and penalties illegally and erroneously exacted of the plaintiff:

For 1919—Penalties and interest	$25,113.43
1919—Taxes	43,457.66
1920—Penalties and interest	24,340.38
1920—Taxes	52,224.54
1921—Penalties and interest	17,615.44
1921—Taxes	56,397.69
1922—Penalties and interest	4,907.33
1922—Taxes	51,449.39
	$275,505.86

and prays costs and general equitable relief. (R. 17.)

To this petition, the defendant-respondents filed their

ANSWER

setting forth the issues, summarized, as follows:

1. General denial except as to specific admissions.
2. Admission of official capacity of defendants and corporate capacity of plaintiff.
3. Admission of levy on plaintiff's property substantially as alleged;
4. That monies paid each year have been distributed to various political subdivisions;
5. That no part of the money is under defendants' control or custody.
6. That defendants have no money under their control or custody out of which to refund, if court would so decree;
7. Statute of Limitations:

8. Laches under allegations of plaintiff's petition and in fact;

9. Estoppel by reason of laches;

10. That plaintiffs have plain, speedy, adequate remedy at law;

11. That plaintiffs' remedy, if any, is appeal to courts from Board of Review;

12. That plaintiffs are not entitled to mandamus under allegations nor under true facts;

13. That failure to deduct U. S. bonds and savings stamps from assessment, was strictly in accordance with law;

14. That any error or intentional illegality on the part of taxing officers cannot be corrected in this proceeding;

15. That plaintiffs, seeking equitable relief, must do equity, and the plaintiffs have during all the years complained of habitually, intentionally, systematically and generally aided and abetted and encouraged its customers to evade taxation and conceal property from taxation, and such an amount is far in excess of amount sought to be recovered from defendants;

16. That plaintiffs are not real party in interest, because taxes in reality paid by and charged to stockholders, and stockholders alone, if any, have right to seek recovery;

17. That plaintiffs were not assessed but the several stockholders were assessed;

18. That there is a defect of parties plaintiffs in that stockholders assessed are not parties nor seeking recovery.

19. That plaintiffs have not been discriminated against by method provided by Statutes of Iowa nor by method under which plaintiff's stockholders were assessed.

20. That an assessment of five mills on all the monies and credits held and owned by the plaintiffs would exceed taxes assessed and plaintiffs are not damaged.

21. That stockholders assessed are also persons complained of as competitors of themselves, and they have acquiesced in the assessments under the two plans, and cannot be heard to complain.

22. That the Board of Supervisors have acted upon the petition of plaintiffs asking this same refund, and refused the refund, and such action is a judicial deter-

mination from which only an appeal or certiorari will lie and mandamus is not tenable;

23. That the plaintiffs were guilty of laches and have waived and are estopped to complain in that they

a. With knowledge in 1919 and 1920 of basis of objections and that monies collected would be distributed, plaintiffs signed and approved assessment rolls;

b. Made no objections except in appeals from Board of Review, in each instance decided against plaintiffs;

c. Made no complaints to taxing authorities;

d. Made no complaint to County Auditor;

e. Never called attention of County Auditor or County Treasurer or any taxing officials, names of individuals or corporations erroneously assessed;

f. Took no appeal from Board of Review in assessments of others in alleged competition with plaintiff;

g. Permitted Municipal corporations to make expenditures and incur indebtedness relying upon the collection of taxes;

h. Waited until taxes were expended and distributed, as to be impossible of recovery by taxing bodies;

i. Permitted funds to be expended for current expense and maintenance and not in interest producing investments, and plaintiff seeks not only return of principal but interest.

24. Plaintiffs are not authorized by stockholders by and for whom taxes were paid to bring these suits.

25. The stockholders at time of commencing of suit are not same stockholders who and for whom taxes were paid, and there is no authority express or implied to represent those who were before but not stockholders at time of commencement of suit.

26. The plaintiff in 1922 or 1923 brought suit in the District Court of the United States, Southern District of Iowa, in injunction on similar or same allegations, and said cause was adjudicated adversely to plaintiff. If not adjudication, payment of taxes after dismissal, was laches.

27. By stipulation the adverse holding in Des Moines National Bank v. Fairweather was an adjudication of plaintiffs' claims in this matter.

28. That the decree, in the cause of action brought by Des Moines National Bank v. Bennett, et al., referred to in Count II of plaintiff's petition, does not constitute an adjudication in that,

a. The plaintiffs are not privy to said action.
b. There is not the same evidence.
c. The issues were not identical.

(R. 31-52.)

This cause was called for

TRIAL BEFORE POLK COUNTY DISTRICT COURT OF IOWA, IN EQUITY,

November 7, 1927, and a long trial was had, in which 5078 pages of oral testimony was given and 1817 exhibits were offered. There was then, as is now evident, a disagreement as to what the important issues were, and as will appear there is a dispute now as to the facts as proven and disclosed. This prevents our making a bare statement of facts, but within justifiable practical limits we submit our

CONCISE STATEMENT OF FACTS

as being in accordance with the rules of this court.

Down to and through the paragraph on page 10 of Brief of Petitioner referring to the case of Des Moines National Bank v. Fairweather, we find no inaccuracies as to fact statements relating to the cause, but at that point on, inferences and statements are made which we believe are expressions of contention rather than fact, so we state the facts as we believe them established by the testimony, avoiding contentions as best we can.

On November 28, 1923, the petitioner made a tender in

the form of Exhibit 1771—(Record 880), declined "because the amount offered was not the amount shown by the tax lists of the county as against the amount to be collected". (Record 596). There is no testimony of any demand with threats unless attached to Exhibit 1766 and it is not in this record.

(See record 585 and 875).

AS TO WHETHER THERE WAS COMPETITIVE MONEYED CAPITAL.

At the outset we correct the inference or assumption of plaintiff where it says on page 13 of its Brief:

> "Since it is conceded by the majority opinion of the Iowa Supreme Court that the shares of these corporations constituted a relatively material amount of moneyed capital within the meaning of Section 5219 of the Revised Statutes of the United States, we shall not burden * * * etc."

This is not correct. The Supreme Court of Iowa in its opinion says:

> "During these years a large number of domestic corporations employing, *as we shall assume*, moneyed capital in competition with plaintiff in Des Moines in like form made to the assessors their sworn statements." (Record 1901).

This is, we believe and assert, only an assumption for sake of argument and is not "conceded by the majority opinion."

We do not reiterate all the statements made in plaintiff-petitioners' brief as much of it is unavoidable in the argument.

By failure of categorical denial we do not wish to be held to have accepted petitioner's statements as accurate.

In the brief petitioner states: Page 16:

> "Substantially all phases of the loan and investment business were carried on in the City of Des Moines during the four years in question by these corporations."

This statement we believe to be one of contention and the facts established show the business as carried on in the banks was not the loan business as carried on by these corporations but was distinctly different and the corporation business instead of being competitive was the doing of that which the banks could not do and enhanced the bank business instead of competing with it.

The same is true of "certain foreign corporations" discussed under petitioner's classification "B" and is true of the individuals. Instead of being "competitors" they were all "customers" of the plaintiff or other banks taxed as plaintiff was, and their very business made them customers.

Since plaintiff-petitioner, by virtue of its assumption that the matter is determined, has not stated the record facts in its statement of the case, we feel compelled so to do and submit a statement of facts as to the

"ALLEGED COMPETING CORPORATIONS".

References are made to the printed Record in this court thus (R. .....). However, there was certified to the Supreme Court of Iowa, by the Clerk of the District Court of Polk County, the "Transcript of testimony", being 5079 typewritten pages. Reference is therefore made also to the Transcript page thus (Tr. 1-100), and are the same references as made in the record certified to this court by the Clerk of the Supreme Court of Iowa, pages 1638 to 1666 inclusive, and the recital of facts there stood unchallenged, pages 1805-1891.

SECURITY LOAN & INVESTMENT CO.
(Tr. 299-336)

This company was affiliated with the Security Trust & Savings Bank "and any really banking business * * * was done with the bank and not with the Security Loan & Investment Company." (R. 204.) The largest single customer of the "company" was the Penn-Mutual Life Insurance Company, handling probably one-fourth of all the company's loans. (R. 204.) The Security Loan & Investment Company operated on money borrowed from the plaintiff banks and the Des Moines National (R. 204.) Most of the business was done on borrowed capital received from the banks, on a transfer of the loans to the bank upon a resale agreement and the banks never once complained of any "competing or interfering" with the plaintiffs (R. 205.) Most of the loans held by the company were up as security with the banks from whom money was borrowed (R. 205.) During the four years the company had second mortgages and when it sold them, it usually guaranteed them. (R. 206.) The Cmpany also as a habit made loans in excess of fifty per cent of the value. One mortgage would be for the fifty per cent amount (R. 206) and a second mortgage for the balance. These excesses amounted to $350,000 of the assets. Sometimes the notes of the loan were in excess of 50% of the value of the security and the last notes were guaranteed by the company. (R. 1102 Den. 6.)

It loaned money on buildings in process of construction and advanced moneys to cover costs as construction progressed. (R. 209.)

Practically, all real estate loans were for five years. (R. 207.)

The company had in 1919 $84,619.00 total capital and surplus (R. 1102.) Cash on hand was $59,000.00 and Liberty Bonds $19,100.00. All the balance of $617,234.00, except $5,-

500.00 was borrowed capital, borrowed from the banks on which interest was paid to the banks. (R. 1103, Den. 8.) In 1920, 1921 and 1922 the same situation was true as of 1919. The company did business as a Trust Company because it could do more business on a small capital than a bank could. The company financed the promotion of subdivisions of land (R. 210.) The financing of buildings were of the type of loans that banks would not make. (R. 210.)

IOWA INVESTMENT & MORTGAGE CO.
(Tr. 378-396.)

The president testified the business of this company was "making real estate first mortgage loans" in Des Moines. The company was loan correspondent of the "Prudential Insurance Company of Newark, New Jersey" (R. 218.) The loans were "made for the Prudential" on improved real estate in each instance. (R. 218.) There was no fixed rule of percentage of value of real estate as to loan. The monthly payment plan would be a loan of larger amount than a direct loan without monthly payments. Direct loans were tried to be kept down to forty per cent of valuation according to Prudential appraisers. *"We did not make the loans ourselves, but they were Prudential loans made on their mortgage blanks and their notes. We simply handled them as their correspondent."* (R. 219.)

The bulk of the business was for the Prudential (R. 219) and the Iowa Investment did not invest its funds in these loans. (R. 219.)

The Iowa Investment & Mortgage Company made other loans. Very few farm loans, mostly city property. A few were second mortgage loans. Second mortgages were not taken as a practice but for a commission on the first mortgage. The Iowa Investment & Mortgage loans were for five years. The loans were made to sell at a profit. The pro-

ceeds could not be kept track of because the company always owed the banks money. The loans were sold in Iowa and foreign states. (R. 220.) No record of the volume of business done was kept. (R. 220.)

The Iowa Investment did not deal in short time paper, except where a loan was sold and a balance of purchase price was evidenced by the note. (R. 219.) Some of the Prudential loans were for 142 months. Monthly payment mortgages were loans up to sixty per cent of the valuation. The Iowa Investment merely acted as fiscal agent of the Prudential. (R. 219.) If the money was advanced before approval by the Prudential, the money was borrowed from the Peoples Savings Bank and interest paid to the bank. (R. 223.) The company handled no funds other than Prudential and not its own capital (R. 223.) In some instances a mortgage second to Prudential would be made in order to reach the amount the borrower had to have. (R. 93.)

CENTRAL IOWA JOINT STOCK LAND BANK.
(Tr. 377-414.)

This company was chartered by a special act of Congress, The Federal Farm Loan Act, for the purpose of making farm loans under the supervision of the Farm Loan Board, having bonds issued against these farm mortgages which were placed in the hands of the government trustee and selling the bond. They made first mortgages only in Iowa and Southern Minnesota. The loans were supervised in every detail.

The mortgages were deposited with the government registrar, and, if approved, the government issued bonds to the registrar and he signed the bonds and the bonds were given to the Land Bank for sale. They were sold in Chicago and New York, in bulk to bond houses. The president could not tell how many of these bonds were out in 1919 to January, 1922.

The item $771,200.00 bills receivable on Exhibit "1406" tax return for 1919 was probably mortgages made and on hand and not yet transferred to the Registrar, but of this the president was not sure. The company held U. S. Liberty bonds $254,218.00. He could not explain and did not know what was the item $1,350,235.00 on Exhibit "1407".

The loans were all for 33 years amortized (R. 224.) No other organizations made this kind of loan except Joint Stock Land Banks (R. 224.) Money to carry on the business was borrowed from the Peoples Savings Bank and Central State Bank and the company paid interest on the loans (R. 224) and carried deposits in those banks. The president was a stockholder in both the Peoples Savings Bank and Central State Bank (R. 225.)

DES MOINES MORRIS PLAN COMPANY.

(Tr. 507-540.)

Charles H. Bryant, the president, testified, the company was in 1919, 1920, 1921 and 1922 engaged in the business of loaning money evidenced "in a form peculiar to our business." Loans were made to the borrower who must have two additional joint makers. (R. 248.) During the period automobiles were financed by purchasing trade acceptances, with conditional bill of sale covering the automobile, from numerous dealers in Des Moines and adjacent towns. The trade acceptances were negotiable instruments secured by endorsement of the dealer due in installments provided for in the body of the instrument. (R. 249.)

The automobile paper drew no interest except after maturity. They were bought at eight per cent discount. There was similar financing of washing machines and other household appliances; handled the same as the automobile paper. (R. 250.)

Investment certificates were issued by the bank or a cer-

tificate of indebtedness with interest, perpetual in form, callable on 30 days by the investor or bank.

In four years, about $2,500,000 of automobile paper was used and about $100,000.00 household appliance in one year. All paper sold was confined to trade acceptances. The bank never discounted its own notes.

The Morris Plan Bank was organized to defeat the loan shark. The bank dealt with the class of people not having credit at a bank and could not obtain credit at a regular banking institution. (R. 254.)

Certificates were issued by the Auditor of State entitling the bank to a qualification for tax purposes under the acts of the 38th G. A.

Loans made by the bank are not desirable loans in the general banking business. Twenty per cent of the business is referred by the local banks. (R. 256.) No checking accounts are carried in the bank.

CONTINENTAL SECURITIES COMPANY.

(Tr. 543-563.)

Marion D. Woods, who was secretary of the company, testified:

The company was engaged in "largely" first real estate mortgage business. The real estate was in Iowa usually close to Des Moines. The loans were made according to a schedule which the company "tried to follow", being between forty and fifty per cent of the value. Some construction loans for the financing of building homes were made, but not many. (R. 257.)

The loans were sold to investors largely locally, but a great many were sent to different parts of the country. Purchase moneys received were reloaned. The certificates were purchased only to protect mortgages held. Most of this was in Oklahoma. Some local improvement bonds were handled,

and "some, not a great deal" financing was done of public improvement contractors. The arrangements were the company bought the bonds, agreeing to pay as the work advanced, and when the job was finally completed, the bonds were turned over in settlement. (R. 258.) The contract was not assigned and only in one instance did they take personal guarantee.

Advances only amounted to $80,000.00. Bonds were purchased below par. (R. 258.)

Debenture bonds were issued secured by mortgages held by the company. The company did in 1912 to 1922 $150,000.00 to $200,000.00 per year. The total highest amount of debenture bonds was "not in excess of $50,000.00" and in 1919 $10,000.00 (R. 259.) A few second mortgages were handled. No deposits were accepted and there was no discounting or rediscounting of short time commercial paper. (R. 130.)

IOWA GUARANTEE MORTGAGE CORPORATION.
(Tr. 565-587.)

J. D. Adelman, the president since 1920 and prior thereto secretary, testified the company is organized under the laws of South Dakota, with its principal, operating place of business in Des Moines and its principal office in Pierre, South Dakota. (R. 261.) The general business was discounting conditional sale contracts covering the sale of automobiles on the deferred payment plan. In 1919 and 1920, some business was done by an automobile distributor selling cars to the Mortgage corporation, who in turn placed the car on the dealer's floor upon a trust receipt. (R. 261.) After 1920 the earnings were by way of discount on sales contracts of automobiles sold by the dealer to individuals (R. 261.)

The notes on Exhibit "103" may be either stock notes or dealers notes (R. 1109.)

The notes in Exhibit "583" for 1920 were $347,000.00 money borrowed from the banks and "other notes" $163,223.00 were stockholders notes. Exhibit "620" notes for 1921 $321,339.00 were automobile notes acquired by discounting installment sale contracts. (R. 262.) The same is true of items $142,000.00 on Exhibit "1477" for year 1921. This business was done in Iowa. The notes and contracts were trusteed with the plaintiff, Des Moines Savings Bank and Trust Company for the purpose of issuing collateral gold notes or bonds. The bank was paid for this service (R. 262). The bonds were sold to banks in Iowa and Illinois. None sold to individuals. These sales furnished turnover of capital.

Automobile paper handled in 1921 was $411,751, 1922 $606,999, 1919 $1,013,740, and 1920 $1,179,032.

Automobile contracts were where title remained in the dealer and the buyer bought on installments over a 12 months' period. The discount was nine per cent. They were always purchased at the beginning of the deal. No banks, so far as known, were doing that business. The contracts were not endorsed by the dealer and the mortgage corporation took its own chances. The only security was the ownership of the cars.

The other method of financing during 1919 and 1920 was the cars would be sold by the distributor to the Mortgage Corporation. The Corporation would place the car on the dealer's floor, take a trust receipt, and an acceptance signed by the distributor and accepted by the dealer payable on a certain date. The distributor is the wholesaler. The distributor was paid and made a bill of sale to the mortgage corporation. The corporation in delivering to the dealer took a trust receipt and retained ownership of the car. (R. 264 & 1108.) If the dealer sold on contract, the corporation took the contract in payment of the acceptance (R. 264.) The corporation borrowed money during these years from the Iowa National Bank, Iowa Loan & Trust Company, Valley

National Bank and Mechanics Savings Bank. None of the banks complained that the corporation was in competition. (R. 265.)

FEDERAL CATTLE LOAN SOCIETY.
(Tr. 657-683.)

This was a South Dakota corporation, engaged in loaning money on cattle in 1919 and 1920. The loans were evidenced by notes and chattel mortgages on the cattle. Customers were sent through the country banks. Applications were left with the country banks. Loans would be for six months, sometimes shorter. 1920 assessment roll, Exhibit "584", shows $144,241 of notes or cattle loans. The cattle were "feeder" cattle. The 1921 assessment roll, Exhibit "1480" shows notes and mortgages $50,000 all Chattel Cattle loans. (R. 275.) The other item, $267,453.31, is stock notes given for corporation stock.

The cattle loans were sold to the banks to turn the capital. None of the loans were made through Des Moines banks (R. 275.) No bank connected to the business but were assisting in securing the loans. Only loans were accepted in excess of what the bank could loan legally. Interest rate was higher. (R. 276.) No loan was taken that the bank could handle and loans were sold in Chicago. They were offered to the Iowa National Bank and Valley National Bank who declined them (R. 277).

The cash assets were on deposit in the Iowa National and Valley National Banks. These two banks declined the loans because the banks did not consider them safe (R. 278.)

No business was done in 1919. The company only actually operated in 1920 (R. 278.) There were no correspondent banks in Polk County (R. 280.) Endorsements of the paper by the company were unqualified (R. 280).

GARNER INVESTMENT COMPANY.
(Tr. 614-639.)

H. W. Garner testified this is a corporation organized some time in 1919 and during the years of 1919, 1920, 1921 and 1922 was in the Valley National Bank Building. The organization's capital was $50,000.00 paid in 1919. The business was that of the purchase or investment or re-sale of notes, mortgages, bonds and at the suggestion of plaintiff's counsel, stated: "They also dealt in negotiable securities that are generally dealt in the business world". The company chiefly dealt in notes and certificates of deposits of banks. The banks in which certificates of deposit were discounted or purchased were Des Moines institutions and were purchased from the people in the vicinity of Des Moines. They were certificates of deposits in the Central Trust Company and they were purchased outright. There was no security other than the certificate itself. The notes purchased were signed by individuals arising in certain business connections and offered to the company for sale. They were all located in Iowa. The majority of them originated around and near Des Moines. They were for sixty and ninety days and for three months, six months and one year. They bought them at a discount and made some investigation as to the solvency and financial responsibility of the makers of the notes. They were endorsed by the party from whom they made the purchase. The company made sales of the certificates of deposit and of the notes, all in Iowa to banks or other investors.

The company did no advertising but received its business by personal solicitation. The company handled bonds and the purchase of blocks of bonds from the dealer, usually by means of borrowed money from the banks together with company funds and then re-sold the bonds to individual investors located in this vicinity. The company made no mortgage loans direct but purchased for investment and held cer-

tain mortgages but no appreciable amount was held in 1921 or 1922. In those two years the general nature of the business was selling bonds.

The entire note business in 1919 and 1920 would amount to $150,000.00. The mortgages were less and very few were sold. The bond business in 1921 and 1922 was probably $200,000.00. No municipal or government securities were handled. No collateral bonds or debentures were issued. The notes were bought at a discount and the company did not run a bank and the paper did not have to have a bankable character, and the notes were bought without recourse and there is no uniformity in the form of the notes. Money was borrowed from local banks and securities purchased were deposited as collateral for the money borrowed. They often had possession of the collateral merely for the purpose of sale. The bank loaned the money for the specific purchase of the bond and for the purpose of making the transaction possible. The bank at no time complained that the company was competing with their business and "I did not believe we were".

The mortgages purchased were usually over three years and the majority of them were Minnesota mortgages. The bonds purchased were industrial bonds entirely. (R. 266-272.)

JESSE F. STEVENSON & COMPANY.
(Tr. 718-734.)

The president of the corporation testified the company were dealers in investment securities, making farm loans on Iowa properties, loans on business and residence properties in the City of Des Moines, also handled and dealt in strictly municipal bonds in connection with city improvements, paying, sewer, etc. The mortgages were sold as quickly as could be done but some were kept longer than was anticipated.

Most of the mortgage loan business was done on the company's own paper, payable to itself. The mortgages were sold to individuals and to insurance companies. The only company for which it solicited business in the way of mortgage loans was the Connecticut Mutual Life Insurance Company. In those cases the forms of the insurance company were used.

The exclusive territory was Polk County but a few loans were made in other counties with co-operation of solicitors in those counties and they were all in close proximity to Polk County. Most loans were made on residence property other than in the City of Des Moines, and on no business property other than in the City of Des Moines.

The company sold and bought the entire issue of public improvement bonds but they were handled largely to supply the demand of individuals that wished that class of security. Most improvement bonds were obtained by the company entering into a contract with the contractor who had the special job agreeing to purchase the securities to be issued at a certain discount. Some time money was advanced on the contract, usually in the larger transactions. When the securities were ready for delivery there was an accounting made and the balance was paid. An assignment of the contract or the proceeds of the contract would be taken. The dealings were entirely with the contractor. There were some occasional transactions with municipalities but very few. Contracts were bought or financed in Newton, Creston, Hedrick and Malvern, Iowa. When money was advanced, a note was taken for it and interest charged. The bonds so purchased were sold by the company to its regular clients. Some United States Liberty Bonds were held but it was a mere matter of accommodation to the people that would come in that bought them. When received, they were usually shipped within a day or two to a Chicago house.

There may have been one or two drainage contractors financed but not to any extent.

In the loans made for the Connecticut Mutual Life Insurance Company, the commission was always paid by the borrower. These loans were exclusively farm lands. A few large loans were made on business properties and while they may not have been made direct to the company, they were at once turned over to the insurance companies but really sold in advance. (R. 286.)

Sometimes farm loans were split into first and second mortgages. In addition to special improvement bonds, some general and direct obligations for municipalities, school districts, etc., were handled. Money during this period was borrowed from the Valley National Bank, Commercial Savings and the Mechanics, and the Bankers Trust and Central State Bank, and this was especially heavy in 1920.

At the time the money was borrowed, the matter was discussed with the officers of the bank as to the purposes and the mortgages or certificates purchased by the proceeds or other securities would be put up as collateral.

There was never any suggestion of an objection on the part of the Valley National Bank or any of the banks, and as a matter of fact they were glad to get the paper. The company gave a note for the money borrowed. In fact, the banks requested some of the company paper and the company was unable to meet the demand. Short time paper was not a part of the business of the company. No deposits or checking accounts were accepted. (R. 285-291.)

FARMERS BOND & MORTGAGE COMPANY.

(Tr. 738.)

The president of this company testified the company was organized in 1920 and the company has been engaged in the business of negotiating first mortgage loans on Iowa land

and on some city property. As a rule, there were no loans on other city property than in Des Moines, possibly once at Maxwell. Loans were made in Polk, Story, Jasper, Madison, Greene, Warren, Union, Clark, Boone and several other counties.

When the loans were made, the company negotiated them and sold them to insurance companies mostly. Few mortgages were sold to private investors. The first mortgage certificates were issued by mortgages being deposited with the Bankers Trust Company and trustee and the certificates issued against the mortgages and countersigned by the trustee. Interest was paid on the certificates. The certificates were collateral by either side prior to any interest date. They were first issued in the latter part of 1920 at the highest amount outstanding of $140,000.00. Most of the loans were five year loans. Occasionally a seven year loan and an amortized loan, a thirty-three year loan for an eastern insurance company were made.

The company borrowed money from the Bankers Trust Company, the Iowa Loan & Trust Company Bank and also from the Valley National Bank, who knew of the transactions and the purposes of the borrowing of the money to make loans and no objections were at any time made by the banks.

The company did not receive deposits or any checking accounts or issue drafts or other evidence of exchange and no savings accounts. (R. 292-298.)

MOTOR FINANCE CO.
(Tr. 790-799.)

This was a partnership composed of M. W. Engleman and Joe Gottstein, operating during the years of 1921 and 1922. The business consisted in buying automobile contracts from dealers, the contracts representing the balance of the pur-

chase price and in a few instances they made direct loans on automobiles to owners of cars.

The indebtedness was evidenced by a note and a chattel mortgage upon the car. Loans were obtained by personal solicitation among the local car dealers and by advertising through the mails.

The first year all of the business was done in Des Moines and later out of the State and in one or two instances outside of the State, some in Minnesota. Business was done in Ames, Nevada, Hampton, Iowa Falls and Mason City.

The company held the notes themselves and purchased them by discounting. The earnings were of the original discount and the interest on the notes.

In addition to the personal funds of the partners, money was borrowed from the banks. Notes made and purchased were kept until maturity.

The company did not receive deposits or honor checks or drafts. In 1921 and 1922 about $100,000.00 business was done. (R. 298-30.)

UNION MORTGAGE & CATTLE LOAN COMPANY.
(Tr. 800-810.)

The secretary, who first became connected with the company in March, 1921, testified that the company was organized in May, 1919. A large part of the business was second mortgages on Iowa farm land. A few first mortgages were taken and quite a few chattel mortgages on cattle. The mortgage loan business was a great part of the business and second mortgages far exceeded the first mortgages. The land upon which loans were made was located exclusively in Iowa—pretty well scattered throughout the State.

Indebtedness was evidenced by a note and mortgage securing it. There was an application for the loan and an appraisal was had. The corporation became defunct.

Cattle loan business was started in the fall of 1919.

Indebtedness was evidenced by notes and chattel mortgages, being first liens on the cattle. The cattle were ordinary feeding stock and the loans ran from sixty days to six months.

Loans were made to farms anywhere in Iowa. The mortgages were made for the purpose of permitting the borrower to purchase cattle and were made for the purpose of giving him time to prepare them for market, with the understanding that the cattle would be marketed and the notes liquidated from the proceeds of the sale.

Loans varied. The largest one was $25,000.00 and the smallest one about $1,000.00. The average was about $2,000.00. The amount of business was probably $100,000.00.

The company was flooded with applications. Circulars were sent out and the company was advertised through salesmen. There were some stock salesmen. (R. 300-301 and 317-328.)

BOND & MORTGAGE COMPANY OF IOWA.

(Tr. 811-841.)

This company was a corporation and the auditor testified that it was incorporated in 1918 and the business was investments, buying and selling bonds and mortgages, notes and securities of different kinds, and in making of mortgage loans on real estate, both farm and city. The properties were confined mostly to Des Moines and some nearby territory. Some loans were made in Newton and Indianola. The bulk of the loans were sold to insurance companies. All loans were sold to eastern companies, particularly the Metropolitan Life Insurance Company of New York and the Western & Southern Life Insurance Company of Cincinnati, Ohio.

The loans were made to the Bond & Mortgage Company

and then assigned to the Metropolitan Life Insurance Company.

In the years 1919, 1920 and 1921 the volume of the business done was probably $400,000.00.

The company handled bonds of various types, government, municipal bonds and very few industrial. Municipal bonds were special assessment bonds and some school bonds. They were purchased from the contractors. In other words, the contractor was provided with the funds to proceed with the work and upon the completion of the work, the bonds were turned over.

The bonds were purchased at a discount and were then sold to clients and investors who lived at varions points throughout the State and one in Nebraska who took a number of them. Bonds were sold mostly in small lots. Investors were clients, stockholders and others obtained through advertising. Some automobile notes were handled. These were given as part of the purchase price on automobiles, secured by a conditional bill of sale. They were bought from the dealer at a discount and then collected usually in monthly payments. These were local dealers. About $50,000.00 in that type of paper was kept working.

The volume of business so handled was probably $100,000.00.

A large volume of farmers notes were purchased. These were unsecured notes made by individuals purchased through one source. They were discounted and endorsed by the party from whom bought. He resided at Newton. The purchase of these notes amounted to $800,000.00 or $900,000.00. Farm loans were made in Missouri—none in Iowa.

The total capital issued in 1919 was $37,770.00. The amount of bonds handled would probably total $1,000,000—that is, the total turnover. Almost all the loans made and sold to the insurance company were fifteen year terms and were usually submitted to them before closed and the insur-

ance company had its appraisers and the corporation its appraisers. The notes purchased were from Mr. Gifford at Newton, who was promoting a manufacturing concern. They were given for merchandise to be delivered at a future time, supposed to be stock food. The notes were sued upon on the basis that the company was an innocent holder for value and in every case tried the jury or the Court held otherwise. Gifford went into bankruptcy and a large number of the makers of the notes and those sued upon were held not to be the owner for value in due course before maturity.

The automobile notes purchased usually spread over a period from six to ten months, during the time the company borrowed money from the Valley National Bank and put up collateral for the loan and told the bank why they were borrowing and the bank did not complain and the bank, knowingly, for the purpose of increasing the corporation's business, permitted the corporation to borrow without any complaint and wished the corporation success. (R. 301-307.)

MANNING MARTIN COMPANY.
(Tr. 842-854.)

The president of this corporation testified that in 1919 to 1922 the company loaned money on Des Moines real estate. Some loans were made in Fort Dodge. They were purely first mortgage loans. Some respect was paid to the appraised value of the property and some depending to some extent on the moral risk. There was no rule with respect to the value of the property except on the judgment of the officers of the company and appraisement and investigation was made as to the responsibility of the borrower.

No mortgages were bought from individuals. Loans were made to individuals, banks and life insurance companies. Some were sold in Chicago, a majority of them in Des

Moines. Ninety per cent of the loans were on residential property.

The total business on five years was one million and a quarter to one million and a half. Money was borrowed to run the business from the Valley National Bank and the Peoples Savings Bank. At times the company owed the banks $30,000.00 to $50,000.00.

Stockholders of the company were C. H. Rosenbaum of the Bankers Life and Mr. E. H. Slininger of the Peoples Savings Bank, W. B. Brown, attorney, and Charles Martin of the Peoples Savings Bank. Some of the loans were sold to the Peoples Savings Bank. Some loans were temporarily taken off the company's hands by the Iowa National Bank. They knew what the company was borrowing money for and were glad that the company was making city loans and wanted the money to finance it and there was no objection nor any suggestion that the company was interfering with or in competition with the bank's business and never refused to loan money on that account.

No savings deposits or checking accounts were carried by the company. Some loaning to contractors to enable them to build houses was done, but it was a very hazardous business. (R. 307-309.)

DES MOINES JOINT STOCK LAND BANK.
(Tr. 873-881.)

The president testified that the company's office was in Des Moines. Its business was making farm loans on mortgages on "the amortization plan as authorized by the act of Congress known as the Federal Farm Loan Act," in Iowa and Minnesota. Loans were only permitted on lands for agricultural purposes, not to exceed fifty per cent of appraised value of security, to be determined by Federal appraiser. Between 70 and 80 per cent of the loans were in

Iowa and 30 per cent in Minnesota. Bonds were issued by the government in lieu of mortgages deposited with the registrar. In four years about $1,600,000 were issued. The bonds were sold to a syndicate and the bank had the funds for reinvestment. Interest was due semi-annually and the loan matures and liquidates in thirty-three years by payment of semi-annual installments.

No mortgages were sold on the open market. No banks in Des Moines were making this type of loan. (R. 312-317.)

FIRST AND SECOND MORTGAGE CORPORATION.
(Tr. 882-896 and 906-914.)

The secretary testified this corporation had the same officers and stockholders as the Des Moines Joint Stock Land Bank though not entirely identical. It was in the brokerage business, bought and sold farm loans, developed city additions and dealt in city property and represented eastern banking houses in the purchase of school bond issues.

The company's stockholders were many country banking institutions through their officers and applications for farm loans were solicited through these banks, which applications were submitted to the Des Moines, Lincoln and Chicago Joint Stock Land Banks, Central Life Insurance Company and Illinois Merchants Trust Company, taking care of all the details as to the execution of the papers and title to the mortgaged land.

In the insurance loans the borrower paid a commission and in the land bank loans the bank paid the commission. The loans were first mortgages. The insurance loans were five, seven and ten year notes.

The company bought a Le Mars Gravel Company bond issue for investment but gave company stock for them. No investment certificates were issued. The company held many stock notes. It did not loan its own money.

All second mortgages were in settlement of purchase of stock in the company. (R. 312-317.)

CONTINENTAL MORTGAGE AND LOAN CO.
(Tr. 1022-1052.)

The secretary of the corporation testified that it was organized in 1919 and did business in the years 1920, 1921 and 1922. Its business was principally automobile financing and some other investments were bought.

The automobile financing was where the dealer sold an automobile, new or second hand, with an unpaid balance of the purchase price, which balance was evidenced by a note and mortgage on the car, six or twelve month's paper. These were purchased by the corporation at a discount. The note bore interest after maturity. The company borrowed money from banks by depositing the collateral as security. Some collateral trust notes were issued also. Possibly a gross of $100,000 business in one year was done. The company would buy any paper it thought sound and profitable but the major business was automobile financing. Only one or two real estate loans were made, except where arrangements for the sale was made before the deal was closed. No Des Moines bank, so far as known, was loaning on any second hand automobiles. (R. 336-340.)

DES MOINES DISCOUNT COMPANY.
(Tr. 1053-1062.)

The secretary-treasurer of this company testified as to the years 1921 and 1922. The company bought notes and in two or three instances bought automobile contracts or loaned money for the purposes of buying automobiles. The notes were all held until maturity. They averaged a year as to maturity. Money was borrowed of the local banks, and no

complaint was ever made that they were in competition. Collateral was always taken for loans. The company handled a class of business the banks would not handle, (R. 342) and the security was of a different type (R. 341-342).

BANKERS MORTGAGE COMPANY.
(Tr. 1063-1086.)

The vice-president and sales manager testified he was with the corporation from July, 1918, to January, 1920. The company dealt largely in farm mortgages, municipal bonds, corporation bonds, industrial and public utility bonds and a few city mortgages, but not many, almost wholly in Iowa. Customers or prospects were produced by the stockholders and bankers.

Loans were first mortgage real estate loans.

Municipal, county and school bond issues were bought. These were resold to any buyer found.

In 1919 all the business done was approximately $1,000,000.

Liberty bonds were bought and sold, as well as railroad bonds and a few foreign bonds. Debenture bonds were issued. These were secured by mortgages deposited with a trustee. No special assessment bonds were dealt in. The witness was not listed as a stockholder of the company in 1918 or 1919 though he claims to be vice-president.

The company got the loans the bank did not want to make. (R. 343-347.)

UNITED MORTGAGE LOAN COMPANY.
(Tr. 1099-1103.)

The president testified this company is a corporation. It made real estate loans, bought contracts. The loans were on Des Moines real estate, first or second mortgages, but mostly

second mortgages. They were generally one year or more. Real estate contracts were also taken as security as collateral to loans. The items $5,979.17 in Assessment Roll of January 1, 1919, Exhibit "1394", were first and second mortgages, the same as to item $5,699 January 1, 1920, Exhibit "1395", $4,544.00, January 1, 1921, Exhibit "1396", and $3,700.50 January 1, 1922, Exhibit "1397".

Some loans were sold to individuals and when sold the money was used to pay debts or buy other securities. The company catered to the risky business with stiffer loans and more profit. (R. 349-353.)

MERCHANTS LOAN & INVESTMENT COMPANY.
(Tr. 1103-1128.)

The vice-president testified the company bought contracts and loaned money on real estate security occasionally on other collateral, but not as a rule. It was a first and second loan business but considerable of a second loan business. Some loans were sold to individual investors in Des Moines. A very limited amount of loans were made on collateral as liberty bonds or stock. Most real estate loans were on Des Moines property while some were on f[redacted] in Dallas and Polk Counties. The company turnover d[redacted]g the years was from 50 to 100 thousand dollars.

The business consisted in the making the loans and either holding them for payment or reinvesting of the proceeds. The company is now liquidated.

The real estate contracts bought were where real estate had been sold on a small payment down and the balance to be paid in installments. There was usually a first mortgage on the property creating a liability of "Bills Payable". Contracts were purchased at a substantial discount and ran a number of years. Stockholders in the Central State Bank, Mechanics Savings Bank, Des Moines National Bank, Central

Trust Company, Valley National Bank and Peoples Savings Bank were stockholders in the company.

It was organized in 1920. The loans were mostly second mortgages and the first mortgages were "stiff" and over fifty per cent of value. The company catered to the business that took more risk and more profit. No deposits were received. Its deposit account was kept in the Central State Bank. Money was borrowed from the Central Trust Company or Central State Bank on collateral. (R. 350-353.)

STATE BOND COMPANY.
(Tr. 1205-1213.)

Ross, an officer (?), testified over objection how the company was doing business prior to his connection with it. He stated the company was organized to sell savings bonds in the city and state. The payments for the bonds were made monthly and the money was invested in first mortgages and deposited with the Auditor of State. The bonds were twenty year bonds with part of them having a settlement privilege after ten years, but the amount he did not know.

The Capitol Hill Bank had issued participating bonds which were taken over by the company upon organization. It was organized by the owner of the bank. What participating meant, he did not know.

The real estate loans were either made direct or purchased from the Capitol Hill Bank. (R. 366-368.)

POLK COUNTY MORTGAGE COMPANY.
(Tr. 1349-1363.)

The president of the company testified: The company confined its business to Polk County. It was in the "subdivision business" and only made loans incidentally. In rare instances was a loan made and disposed of for a com-

mission. Never was a loan bought and loans were made as a rule only incidental to the sale or subdivision of property. Loans were made to promote the sale of property and the note was usually to the company. The mortgages were usually first mortgages. The money was usually money belonging to the president's relatives. Some loans were made in connection with real estate transactions for the purpose of enabling the buyer to pay off obligations accrued against the property. They were advances. Some Liberty bonds were taken on payment of property. Real estate was the principal business, that is, buying a tract of land and then subdivide them and sell the lots, usually on monthly payment contracts. All loans made were only incidental. (R. 391-394.)

CORN BELT LAND & LOAN COMPANY.
(Tr. 1409-1417.)

A stockholder, a brother of the president, but otherwise we find nothing to call him "chief", testified, he was familiar with the business "in a general way". The company was in the general real estate loan business, buying lands, borrowing money and making loans for other people, "that is all". It was the general rule of the company to have applications made for loans and after some one has inquired for a loan, have a man or men go to various places and seek the money, and after the company "was sure" it could get the money, the transaction would be closed and the loan made. Most security was real estate, but some were chattel loans. The loans read largely to the person taking them over. Some money was received from insurance companies but the company was not the official representative. Some loans were made to the company where it borrowed the money from the insurance company. It was very seldom the company sold a loan.

The witness lived in Illinois in 1919 and 1920 and had

very little to do with the company except reports and letters were sent him. The president, since deceased, stated the company had none but purchase price mortgages in 1919 and the witness says that is correct.

The company was not in the business of buying and selling short time paper and took no deposits. (R. 400-401.)

GUARANTEE MORTGAGE & FINANCE CO.
(Tr. 3307.)

The president of the company testified, it was a corporation under the laws of Iowa, beginning business when it was incorporated in 1918, but its organization was not completed until 1919. It was an investment company and bought and sold securities and dealt in farm lands and securities. It handled both first and second mortgages. In cases, it made loans direct to the borrowers, mostly in Iowa. Most of the loans were farm loans and only one or two pieces were done on city mortgages and that was in Des Moines. The company issued debenture bonds. As an example, $120,000.00 of mortgages would be taken and deposited in trust and against them $100,000.00 of collateral or debenture bonds issued. These were an obligation of the company. They were sold in Iowa and bore interest. They ran for five years. The first issue was for $100,000.00 and $80,000.00 of them were sold. The second issue was $100,000.00 and $29,000.00 of those were sold. There were some collateral loans but as a matter of business the loans were only real estate.

The $75,000.00 item in Exhibit "1427" represents stock subscriptions, notes and mortgages. The collateral loan item of $99,000.00 in the tax report of January 1, 1920, were collateral loans made to stockholders, the collateral being the company's stock. The item $213,575.00 liabilities were mortgages on farms that the company had purchased. The item of assets $989,542.06 in the statement of 1920, is certificate

of deposit $157,903.00; liberty bonds $191,050.00; mortgage notes $533,700.00; and collateral notes $99,563.60; stocks purchased $7,325.00.

The item in January, 1921, tax statement assets $1,222,931.00. This represented liberty bonds $151,450.00; and collateral notes $299,279.00 which had been originally stock subscription notes but now were stock collateral notes and a secured note of $4,353.00 and a commisison note of $600.00.

In January, 1922, the asset item of $1,443,127.00 was made up of $1,101,936.00 mortgages, collateral notes $311,488.00, and notes receivable $24,000.00; certificate of deposit $5,000.00, and a commission note of $480.00; stocks purchased were $34,767.00 and bonds $12,360.00.

January 1, 1921, the company owed the Peoples Savings Bank, Des Moines, Iowa, $35,000.00, the Des Moines National Bank $25,000.00, and the Mechanics Savings Bank $25,000.00, and a Chicago National Bank $90,000.00. In January 1, 1922, the company owed the Peoples Savings Bank $15,000.00, Des Moines National $25,000.00, Slater Savings Bank $2,052.00, and $195,055.00 for farm mortgages, and $59,500.00 on deferred lease payments. (R. 616-619.)

NATIONAL INVESTMENT & FINANCE CO.
BURNS BROS. COMPANY.
BURNS BROS., INCORP.
(Tr. 4367-4375.)

The secretary states the Burns Bros. Company was a corporation, with its principal place of business in Des Moines. The witness first became associated with the company in September, 1921, and the witness to that time had not been interested in the Burns Bros. Company or the National Investment & Finance Company. He was elected secretary in January, 1922, and prior to that time only a stockholder. In 1921 and 1922 the company conducted an insurance depart-

ment and also had money invested in real estate mortgages and they did not handle issues of bonds or hold any. The witness thinks they dealt in mortgages and owned some farm mortgages, but they did not hold any collateral loans or mortgages upon live stock or anything of that sort.

Exhibit "1422", being the tax statement of 1922, showing the item $318,556.00 represents stock purchased in the company. The last $100,000.00 of it was for money owing on stock. The other $200,000.00 the witness does not know what it represents.

Miss Hamilton, (Tr. 1193-1204) the witness, testified that she was with the Burns Bros. Company beginning January, 1921, when it came into existence. It took over the business of the National Investment & Finance Company, the name being changed in 1921. The witness was also employed by the National Investment & Finance Company. She was a stenographer until 1921 or 1922 and then auditor for the company.

Witness stated that her memory was not clear on the business prior to the Burns Brothers Company but that she knows livestock loans were talked about and only a very, very few were made. Some mortgages were made on farm property located in Iowa. The company handled some large blocks of municipal or school district bonds. They did not handle paving bonds or street improvement bonds. They did buy and sell some mortgages but only a few were sold and many were held.

For some loans collateral such as stocks and bonds were taken.

The Burns Bros. Incorporated was not turned into the Burns Bros. Company. It remained separate and was liquidated.

Burns Bros. Company borrowed from the Des Moines National and Iowa National Banks in Des Moines. (R. 743-747.)

THE BANKING BUSINESS OF PETITIONER.

The statement contained in petitioner's brief while fairly accurate is far from complete and therefore entirely misleading.

The Petitioner, Central State Bank, is "a corporation, organized under the laws of State of Iowa, engaged in the banking business as a *State Bank* with its principal place of business in the City of Des Moines, Polk County, Iowa." (R. 59.)

It brings this action for itself and in behalf of its stockholders (R. 60) to refund to plaintiff taxes exacted of plaintiff (R. 72).

It did not discount notes secured by collateral mortgage, upon automobiles purchased, where the note was payable in installments. It did not make loans of that character. It did not conduct its business that way either as to auto sales or truck sales. It did not deal in that kind of paper. (R. 570-571.) This bank would not loan a man money with which to buy an automobile and take a mortgage on the automobile as collateral security. In such an instance he would not buy an automobile. (R. 572.) It did not buy notes or mortgages secured by automobiles where the notes were not indorsed by the dealer selling the cars or trucks. (R. 572.)

During the four years the bank did not purchase any bond from public improvement contractors. (R. 573.) It loaned them money on security on their notes. (R. 573.) The petitioner is in error when it states in its brief the bank "frequently accepted public improvement bonds and assessment certificates in payment of advances to contractors", as its president denies this. (R. 573.) It never contracted to furnish a public improvement contractor funds or finances and to accept the proceeds of a public contract in payment of his note. (R. 1175.)

It did not make loans to cattle dealers secured by chattel mortgages on the cattle, but it made loans to country banks who asked the bank to carry the excess loans on cattle paper and livestock paper. (R. 574.) The president of the bank stated, "I want to withdraw from the record any suggestion or testimony that our bank was engaged in financing the purchase or feeding of cattle." (R. 1176.)

It made a small loans to people but the borrower "must not" be "such a man as would be required to support his borrowing power by mortgage on household furniture or other such article." (R. 1177.) He could not borrow without a responsible endorser. (R. 1177.) It did not even have a form of chattel note in the bank. (R. 576.)

It did not handle any market bonds until in 1921 and 1922. The bond department only began to take on importance in 1921. At that time there was no Des Moines institution, not a bank, competing for that kind of business. (R. 1178.)

It did not make real estate loans in excess of 50% of the appraised valuation of land, without the improvements, and in cities no more than 50% of land and improvements, and not in excess of 5 years. Many of the farm loans would not be made unless it first found a purchaser. (R. 577.) The bank considered anyone holding a real estate loan a competitor of the bank (R. 579) and the buyer buying from the bank thereby became its competitor.

This bank as a matter of practice would sell a mortgage, make an assignment executed by the bank and the assignment would not be placed of record, but, at the expiration of the term of the mortgage, the release of the mortgage would be made by the bank and the bank knew by the failing to record the mortgage, the buyers were in truth and fact dodging taxes. (R. 763-764.)

SUMMARY OF ARGUMENT.

I.

Under the pleadings and the facts as shown in the record, appellants can not maintain an action in madamus.

(a) Claims for refund of taxes erroneously or illegally exacted must be presented to the Board of Supervisors.

Bibbins v. Clark & Co., et al., 90 Iowa, 230.
Brownly v. Marion Co., 53 Iowa, 487.
Dickey v. Polk County, 58 Iowa, 287.
Richards v. Wapello Co., 48 Iowa, 507.

(b) The Board of Supervisors shall direct the County Treasurer to refund taxes *found* to have been erroneously and illegally exacted and paid.

Section 7235, Code of 1927.
Section 1417, Code of 1897.

(c) An erroneous assessment is one made when officers have power to act but err in the exercise of the power. An illegal assessment is one where they have no power to act at all.

Ford v. McGregor, 23 Pac., 508 (Nev.).
Griswold v. Calhoun Co., 198 Ia. 1240.

(d) The Board of Supervisors must ascertain whether the taxpayer is entitled to be reimbursed.

Section 1417, Code of 1897.
Section 7235, Code of 1927.
Bank v. Board of Supervisors, 168 Iowa, 501.

(e) The plaintiffs had filed their claims for refund with the Board of Supervisors and such Board had ascertained that their claims should be denied. (Printed Record page 557, line 32, and page 558, lines 1 to 12, inclusive.)

(f) An action of mandamus will lie to compel an inferior tribunal, board, or corporation to do or not to do an act.

Section 12440, Code of 1924.

(g) The action of mandamus will not issue to control discretion.

Section 12441, Code of 1924.

(h) There is a great difference between discretionary acts and ministerial acts:

(1) A ministerial act is one that one performs without regard to his own judgment on the propriety of the act being done.

(2) A discretionary act is one that involves the exercise of judgment based upon facts to be found.

Ferris on Extraordinary Legal Remedies, Section 206.

Clark v. Board of Directors, 24 Iowa, 266.

Preston v. Board of Education, 124 Iowa, 355.

Griebel v. Board of Supervisors, 202 N. W., 379, 200 Iowa 143.

Riley v. City of Des Moines, et al., 212 N. W., 716, 203 Iowa 1240.

Sarby v. Morey, 221 N. W., 492, 207 Iowa, 521.

(i) Before the Board of Supervisors would have been justified in directing the County Treasurer to make refund upon plaintiff's claims they would have to find from the facts adduced:

(1) That other moneyed capital in competition with banks had been assessed at a different rate than shares of bank stock.

(2) That a relatively material amount of moneyed capital was so used.

(j) Under the provisions of Section 7235 of the Code of 1927 and 1417, Code of 1897, the Board of Supervisors not only are required to make a finding of facts before ordering

a refund but also act in a *quasi judicial* manner and mandamus will lie to compel them to act but not to control their action.

Ferris on Extraordinary Remedies, Section 283.
High on Extraordinary Remedies, Volume 1, page 50, Section 42 and 43.

(k) The abatement or reduction of taxes improperly assessed is a judicial rather than a ministerial act.

High on Extraordinary Remedies, Vol. 1, page 158, Sec. 141.

(l) The writ of mandamus can not be used as a means of appeal or as a writ of error.

Ferris on Extraordinary Legal Remedies, Sec. 191-299.
Interstate Commerce Commission, Plaintiff in Error v. Merchants Ass'n of New York, 67 Law Ed., 112.
Woodbury Co. v. Talley, 147 Iowa, 498.

(m) The decision of the Board of Supervisors in denying the refund can not be attacked collaterally.

Scripture v. Burns, et al., 59 Iowa, 70.
Sullivan v. Robbins, 109 Iowa, 235.
Collins v. Board of Supervisors, 158 Iowa, 322.
Littell v. Webster County, 152 Iowa, 206.

(n) Mandamus will not lie to compel the payment of money by public officers if there is no fund out of which it legally can be paid and the burden is on the plaintiff to allege and prove the existence of the fund.

Woodcock v. Board of Education, 10 A. L. R., 181.
Iowa Ry. Land Co. v. Woodbury Co., 64 Iowa, 212.
38 Corpus Juris, page 770, Section 412.
Rice v. Walker, 44 Iowa, 458.
Section 12452, Code of 1927.
Farson v. Baird, 63 Law Ed., 233.

(o) Plaintiff can not maintain this action because the necessary parties are not before the court.

State, ex rel., Volunteer Relief Ass'n of Wilmington v. Mayor and City Council of Wilmington, et al., 118 Atlantic, 640 (Del.).

Rankin v. Noel, County Commissioner, et al., 185 S. W., 883 (Tex.).

(p) Plaintiffs' remedy, if any, as to the action of the Board of Supervisors, is at law.

Section 12456, Code of 1927.

Gaffney v. Young, 200 Iowa, 1030.

Riley v. City of Des Moines, 212 N. W., 716, 203 Iowa, 1240.

Home Savings & Trust Co. v. District Court, 121 Iowa, 1.

Jewett v. Ayres, 167 Iowa, 431.

Woodbury Co. v. Talley, 147 Iowa, 498.

And other cases cited in Brief.

II.

(a) Appellants' remedy was by appeal from the local Board of Review.

Iowa National Bank v. J. M. Stewart, 232 N. W. 445 (Iowa).

Griswold Land & Credit Co. v. Calhoun Co., 198 Iowa, 1240.

First National Bank v. Board of Review, 199 Iowa, 1124.

First National Bank of Newton v. Board of Review, 204 N. W., 223, 200 Iowa, 131.

Lamont Savings Bank v. Luther, 200 Iowa, 180.

First National Bank of Montezuma v. Board of Review, et al., 201 N. W., 769, 199 Iowa 1124.

Nelson v. First National Bank, 42 F. (2d) 30, (C. C. A. 8th.).

(b) When the laws of a state create a tribunal for the correction and equalization of assessments and provide that persons aggrieved may apply to such board for the correction of errors, and confer upon the board powers so to do, it is for the Suprme Court of the state to determine whether the remedy is exclusive, and its action in that respect raises no federal question.

Railway Company v. Patterson, 154 U. S. 130, 14 S. Ct. 977.
First National Bank v. Anderson, 269 U. S. 341, 346.

(c) The decisions of the highest court of a state are conclusive on the federal courts in fixing the power, duties and authority of revenue collecting officers.

Hendrickson v. Apperson, 245 U. S. 105, 38 S. Ct. 44, 62 L. ed. 178.
Hendrickson v. Creager, 245 U. S. 115, 38 S. Ct. 46, 62 L. ed. 185.

III.

The acts of the taxing officers in these cases, even if erroneous or illegal, fall far short of being "the deliberate, intentional and willful acts" such as might constitute a violation of Sec. 5219—U. S. Rev. Stat.

Davenport Nat'l. Bank v. Board, 64 Iowa, 140-3.
Jenkins v. Neff, 46 (U. S.) L. Ed., 1140.

IV.

Where the state law itself is admitted to be not in violation of Section 5219, but it is claimed that the erroneous *administration* of the law is in contravention of Section 5219, then the moneyed capital, as to which complaint is made, must be moneyed capital in competition with the individual bank complaining, and not moneyed capital which might

be in competition with some other bank under same circumstances. And in any event, it must be moneyed capital in a material or substantial amount in competition with some material branch or substantial part of the ordinary and legitimate banking business which is actually being performed by the complaining bank.

Davenport Nat'l. Bk. v. Board, 123 U. S., 83.
Georgetown Nat'l. Bk. v. McFarland, 273 U. S., 568; 47 (U. S.) Sup. Ct. Rep., 467.
First Nat'l. Bk. Guthrie Center v. Anderson, 196 Iowa, 587.
Manning Bank v. Armstrong, 211 N. W., 485-7, 204 Iowa, 512.
Head v. Board, 170 Iowa, 300.
First Nat'l. Bk. Montezuma v. Board, 199 Iowa, 1124-34.
First Nat'l Bk. v. Anderson, 192 N. W. 6, 196 Iowa, 587.
Mercantile Nat'l. Bk. v. N. Y., 121 U. S., 138.
Aberdeen Bk. v. Chehalis, 166 U. S., 440.
First Nat'l Bk. Newton v. Board, 204 N. W., 223, 200 Iowa, 131.
Jasper Co. Sav. Bk. v. Board, 202 N. W., 387 (Iowa).
Poweshiek Sav. Bk. v. Johnston, 202 N. W., 384, 199 Iowa, 555.
Des Moines Nat'l. Bk. v. Fairweather, 68 (U. S.) L. Ed., 190.
First Nat'l. Bk. v. Anderson, 70 (U. S.) L. Ed., 171.
Mercantile Nat'l. Bk. v. Hubbard, 98 Fed., 465.
People ex rel. v. Goldfogle, et al., 205 N. Y. S., 870.
Affirmed on appeal, 211 N. Y. S., 85.
Affirmed on appeal, 152 N. E., 418 to 420

A bank cannot buy and sell stocks and bonds of other corporations, or deal in them on commission.

Vol. 1, Morse on Banks & Banking (5th Ed.), Sec. 59, note 4.
People ex rel. v. Peabody, et al., 211 N. Y. S., 114.

National banks cannot exercise any powers not expressly granted or necessarily incidental to those granted. They cannot deal in stocks of other corporations.

California Bank v. Kennedy, 167 U. S., 362.

It must be competition with actual transactions carried on by the bank complaining, not merely in competition with something the bank might do.

People ex rel. v. Goldfogle, 151 N. E., 452 (N. Y.).

National banks cannot lawfully sell and deal in farm mortgages for a commission.

Farmers Mer. Nat'l. Bk. v. Smith, (C. C. A.) 77 Fed., 129-36.

Short time chattel loan companies are not in competition with national banks.

Welfare Loan Society v. Des Moines, 219 N. W., 534, 205 Iowa 1400.

Universal Loan Corp. v. Board of Review, 219 N. W., 536, 205 Iowa 1391.

V.

The corporations who were taxed on their moneys and credits could not constitute competition with National Banks contrary to Sec. 5219, because that statute provides that it must be the "moneyed capital in the hands of individual citizens" that must be taxed the same as National Banks. These corporations are not "individual citizens".

Davenport Nat. Bank v. Board, 123 U. S., 83.

People v. Doty, 80 N. Y., 225-8.

Perkins v. Smith, 23 N. E., 21-3 (N. Y.).

Prim v. Fort, 57 S. W. 972 (Tex.).

Prim v. Fort, 57 S. W. 86 (Tex.).

First Nat. Bank of Aberdeen v. Chehalis, 166 U. S. 440.

Bank v. Chapman, 173 U. S. 205.
Mercantile Bank v. New York, 121 U. S. 138.
Perkins v. Smith, 23 N. E. 21-3 (N. Y.).
People v. Doty, 80 N. Y. 225-8.

VI.

As National Banks were restricted as to the character and locality of the real estate loans they could make, it was necessary to show, in order to establish competition, that the loans made by the individuals and corporations complained of, were the class of loans that could have been made by a National Bank. This, in most cases was not done.

First Nat'l. Bank v. Hartford, 47 Sup. Ct. Rep., 462.
First Nat'l. Bank v. Anderson, 192 N. W. 6, 196 Iowa 587.
Merchants Nat'l Bk. v. Richmond, 256 U. S., 635.
First Nat'l Bank, Montezuma, v. Board, 201 N. W., 769, 199 Iowa 1124.

VII.

There is no such discrimination shown between the taxation of the State Banks and other corporations and individuals as to constitute a violation of either the State or Federal Constitution. The State Banks are creatures of the state and have only such rights as are granted by the State.

Layman v. Telephone Co., 123 Iowa, 591-600.
U. S. Express Co. v. Ellyson, 28 Iowa, 370-7.
Hawkeye Ins. Co. v. French, 109 Iowa, 585-9-90.
Primghar State Bank v. Rerick, 96 Iowa, 238-42-4.
First Nat'l. Bank v. Council Bluffs, 182 Iowa, 107-120.
Des Moines Nat'l Bank v. Fairweather, 191 Iowa, 1240.
Langhart v. First Nat'l Bank, 191 Iowa, 957.
Waterloo Trans. Co. v. Supervisors, 131 Iowa, 237-43.

Iowa Mut. Tor. Ins. Assn. v. Gilbertson, 129 Iowa, 658-67.
Bells Gap R. R. v. Commonwealth, 134 U. S., 232.
Chester v. Penn, 134 U. S., 240.
Home Ins. Co. v. N. Y., 134 U. S., 594.
Pac. Ex. Co. v. Seibert, 142 U. S., 339.
Charlotte Ry. Co. v. Gibbs, 142 U. S., 386.
Jennings v. Coal R. Imp. Co., 147 U. S., 147.
Giozza v. Tierman, 148 U. S., 657.
Warren v. Henly, 31 Iowa, 31.
First Nat'l Bk. of Montezuma v. Board, 201 N. W., 769, 199 Iowa 1124.

VIII.

In no event could the erroneous or even illegal individual acts of the taxing officials or some of them become a violation of the Constitution as it could be reviewed and relief obtained by certiorari. The Auditor could have corrected the error but appellants did not ask him to.

First Nat'l. Bank v. Weber, 196 Iowa 1155.
Sec. 7149—Code of Iowa, 1924.

The Auditor might have been compelled to correct the errors by mandamus.

Ridley v. Doughty, 77 Iowa, 226.
Ridley v. Doughty, 85 Iowa, 418.
First Nat'l. Bank v. Hayes, 186 Iowa, 892-4.

The unauthorized act of an official especially where it is expressly contrary to the state law does not raise a constitutional question or a federal question under the Constitution.

Barney v. City of New York, 193 U. S., 430-8.
Ft. Madison Sec. Co. v. Maxwell, 202 Iowa, 1346.

IX.

The previous appeals from the Board of Review taken by the banks as to these very assessments, and the suits brought in Federal Court by some of them and later dismissed, constituted adjudications. They either did raise, or could have raised in these prior appeals and suits, all of the objections they are now making.

Pierce v. Nat'l Bank of Commerce, 268 Fed., 487.
Taylor v. Taylor, 240 S. W., 6 (Ark.).
Cressler v. Brown, 192 Pac., 417 (Okla.).
Reinkey v. Wilkins, 179 N. W., 751 (Wis.).
Eder v. Fink, 180 N. W., 542 (Minn.).
Village of Winnetka v. Handy, 128 N. E., 805 (Ill.).
Blondel v. Woodbury Co., 212 N. W., 335, 203 Iowa 1099.

X.

The taxes complained of, it is admitted, were not illegal but at most only erroneous. In such case if payment is made it cannot be recovered back unless it was paid under protest. And such protest must point out the very matters complained of. This was not done in these cases.

S. Dak. Sec. N. Bk. v. Twinde, 217 N. W., 542 (S. Dak.).
Hawkeye Co. v. Marian, 110 Iowa, 468.

Nor can interest and penalties be remitted.

Lamont Sav. Bank v. Luther, 200 Iowa, 180.

XI.

The banks, both national and state, were all guilty of laches and are by their acts and omissions estopped to make the claims they are now making. They made no protests for years against the taxing officers assessing their alleged

rivals on the 5 mill basis; they never asked the Auditor to correct the error as he had power to do; they never appealed from the erroneous action of the Board of Review as to their rivals; they appealed as to their assessments but did not raise the present questions; they allowed the taxes paid by them to be distributed to the various taxing bodies without protest or objection; they signed the assessment rolls and agreed to pay the taxes without any objection to the method of assessment, except as to including U. S. bonds; some of them brought suits raising the very questions now raised and then dismissed them and paid the taxes; many of the individual competitors complained of were stockholders in one or more of the banks, and many of the stockholders and officers of the corporation competitors were also stockholders and officers in the banks.

Slimmer v. Chickasaw Co., 140 Iowa, 448-53.
Farmers Ins. Co. v. Linn Co., 202 Iowa, 444.
Sec. 7149, Code of Iowa, 1924.
Fiman v. Hughes Co., (S. D.), 225 N. W., 711.

XII.

The plaintiff banks have not come into equity with clean hands. They have systematically assisted their customers in evading taxation. They have combined together unlawfully to decrease the rate of interest charged by them and to make a charge for carrying small accounts.

13 Corp. Juris, page 444, Par. 381.

XIII.

The banks cannot maintain these suits as they are not the real parties in interest. If any one was improperly taxed it was the stockholders, and not the banks, and the stockholders are the only ones entitled to the refund. The banks have no right to represent them. Many who were

stockholders when these taxes were levied and were paid by them, are no longer stockholders of these banks. There is a defect in parties plaintiff.

37 Cyc., 1187.
Board v. First Nat'l Bank, 57 N. E., 728 (Ind.)
First Nat'l Bank v. Patterson, 176 Pac., 498 (Colo.).
Primghar Bank v. Rerick, 96 Iowa, 238-42-4.
Head v. Board, 170 Iowa, 300-5-6.
First Nat'l Bank v. Council Bluffs, 182 Iowa, 107-14.
Andrew, Supt. v. Munn, Treas., 218 N. W., 526, 205 Iowa, 723.
Stickney v. Bangor, 30 Me., 404.
Fiman v. Hughes, (S. D.) 225 N. W., 711.
Farmers Nat'l Bank v. Hoffman, 93 Iowa, 119-22-4-5.
Sec. 7235 of Code of Iowa, 1924.

Where a bank pays out of its assets the taxes on shares of stock held by the stockholder, such action amounts to the declaration of a dividend.

Redhead v. Iowa Nat'l Bank, 127 Iowa, 572.
In re Feliciana Bk. & Trust Co., (La.) 78 So., 169.
Stapylton v. Haggard, 91 Fla., 93.
Hershire v. First Nat'l Bank, 35 Iowa, 272.

XIV.

There was no discrimination as against the banks in any event, because a five mill levy properly applied to the moneys and credits held by the banks would have exceeded the tax complained of.

Sec. 6992, Code of Iowa, 1924.

XV.

The actions are barred by the Statute of Limitations.

Subdiv. 4 of Sec. 11007 of Code of 1924.
Murphy v. Supervisors, 215 N. W., 744, 205 Iowa 256.

XVI.

The first year's taxes sought to be recovered are those assessed as of January 1st, 1919, and related to the property acquired and held during 1918. There is no evidence offered as to any competition in 1918, so the banks cannot in any event recover the taxes assessed as of January 1, 1919. For the same reason all evidence of competition during 1922 is irrelevant and immaterial, and cannot be considered.

Iowa Code of 1897, Sec. 1323.
Iowa Code of 1897, Sec. 1359.
Iowa Code Supplement of 1913, Sec. 1366.

XVII.

The petitioners have not exhausted their remedy before the Supreme Court of Iowa. This record shows the petitioners have filed a notice of intention to file a petition for rehearing in said court, the Supreme Court of Iowa on said petition having authority to grant a rehearing and to determine the case favorably to petitioners' contention.

Sections 12880-12882, inclusive, Code of Iowa, 1927.

XVIII.

A decree and judgment of the Supreme Court of Iowa does not become final and enforceable until the procedendo is sent down from the Supreme Court to the lower court, and until this is done there is not a final decree from which the petitioners herein can petition for certiorari to this honorable court, as required by Section 237, Judicial Code as amended. The procedendo has not been sent down in this case.

Sections 12875, 12876, Code of Iowa, 1927.

Rule No. 37, Supreme Court of Iowa, is as follows:

"No procedendo shall issue in any case until the expiration of thirty days from the filing of the opinion, except upon an order of the court, or a judge thereof, upon cause shown, and except in criminal cases and cases where petitions for rehearing have been overruled."

Chicago Great Western R. R. Co. v. Basham, 249 U. S. 164.

Andrews v. Virginian Ry. Co., 248 U. S. 272.

Citizens Bank v. Opperman, 249 U. S. 448.

Ohio River Company v. Fisher, 115 Fed. (C. C. A.) 929.

ARGUMENT.

PROPOSITION I.

Mandamus Was Not the Proper Remedy.

Petitioner Banks filed their claim with the Board of Supervisors of Polk County asking for a refund of the taxes complained of, and although the Board of Supervisors had a number of regular sessions and a great number of special sessions, the testimony and record shows that the Banks at no time appeared before such Board and offered any testimony.

Sometime after the claims were filed petitioners brought an action of mandamus in the District Court of Polk County asking that a writ of mandamus issue to compel the Board of Supervisors to order the County Treasurer to refund the sums claimed to have been illegally or erroneously exacted. Among other things the respondents plead that the Board of Supervisors had acted upon the matter and had denied the claims and that mandamus was not the proper remedy. Before the testimony had shown that the Board of Supervisors had acted upon petitioners' claims, and in fact at the very outset of the trial, counsel for the respondents raised the question that the only evidence material in the trial of the case was such as to show that the Board of Supervisors refused to act upon plaintiff's claim, and by stipulation this objection was to stand without repetition. After petitioner had shown by the records of the Board of Supervisors that the Board had acted upon the claims of the Banks, the right of the petitioners to maintain their action in mandamus was again challenged, respondent challenged the propriety of the action of mandamus and moved the Court to transfer to law on the theory that petitioners were seeking a money judgment.

Having called the Court's attention to a few excerpts from the record we now inquire whether or not the action of mandamus will obtain as against the Board of Supervisors. And in discussing this question, while we have heretofore set out our brief points in subdivisions, the cases as we view them are all so closely related that they will be considered more or less as a whole.

ARGUMENT ON PROPOSITION I.

As has heretofore been pointed out, petitioners filed a verified claim for the sums sought to be recovered in this action with the Board of Supervisors, and the Board of Supervisors acted upon said claim and disallowed the same, and petitioners then sought by way of a writ of mandamus to compel the Board of Supervisors to undo the action already taken by the Board and direct the treasurer to make a refund of the amounts claimed by petitioners.

There can be no controversy but that it is necessary that petitions for the refund of taxes claimed to be illegally and erroneously exacted, must be presented to the Board of Supervisors and the cases cited in subdivision "a" of our brief clearly demonstrates this. It is equally as clear that if petitioners were entitled to recover, the money must come from the particular funds to which it has been distributed.

Inasmuch as the claims were presented to the Board of Supervisors and had by them been disallowed, there being no showing in the record as to what evidence was presented before the Board of Supervisors nor no allegations of fraud as against the Board, it must be presumed that the Board of Supervisors acted fairly and impartially in making their decision.

It is further shown by the record that the money paid by the petitioners to the Treasurer of Polk County was distributed to the various political subdivisions of the County

and of the State in accordance with law. Petitioners contend that by the provisions of Section 7235 of the Code of 1927, Section 1417 of the Code of 1897, they are entitled to maintain a writ and secure an order directing the Board of Supervisors to order the refund of the taxes in the amount claimed by appellants. Section 7235 of the Code of Iowa 1927 reads as follows:

> "Refunding erroneous Tax. The Board of Supervisors shall direct the Treasurer to refund to the taxpayer any tax or portion thereof found to have been erroneously exacted or paid, with all interest and costs actually paid thereon."

From a reading of Section 7235, and it is the same as Section 1417 of the 1897 Code, provision is made for refunding not only erroneous but also illegal tax, and it may not be out of place to call the Court's attention to the distinction between an erroneous and illegal tax. The clearest definition we are able to present and one which has met with uniform favor is the one found in the case of *Ford v. McGregor*, 23 Pac., 508, wherein the court says:

> "There is a distinction between an erroneous and illegal assessment. An erroneous assessment is when the officers have power to act but err in the exercise of the power; and an illegal assessment is where they have no power to act at all."

Applying this definition to the facts as disclosed in this case we must immediately reach the conclusion that the tax is an erroneous one rather than an illegal one, if subject to either such criticism.

It is our contention that Section 7235 as hereinbefore set forth, establishes and makes the Board of Supervisors a special tribunal for the determination of the fact question as to whether the taxes were erroneously exacted. The manifest design of this statute is that the Board of Super-

visors first ascertain whether the taxpayer is entitled to be reimbursed for taxes claimed to be erroneously exacted, and if so that the Treasurer be directed to refund the same from the several funds to which they have passed.

Our own Supreme Court in the case of *Bank v. Board of Supervisors, et al.*, found in 168 Iowa, page 501, in discussing this section which was then Section 1417 of the Code, and no change has been made therein, said:

> "The manifest design of this statute is that the board of supervisors *first* ascertain whether the taxpayer is entitled to be reimbursed for taxes illegally or erroneously exacted and if so, that the treasurer be directed to repay the same from the several funds to which these have passed. Such was the interpretation given in *Iowa Ry. Land Co. v. Woodbury Co.*, 64 Iowa, 212, where recovery against the county was denied, and this decision was followed in *Everly v. Jasper County*, 72 Iowa, 149. It is the duty of the treasurer only to repay from the particular funds into which the taxes have gone and, when necessary, to ascertain by computation the amount to be taken from each. *District Township of Spencer v. District Township of Riverton*, 56 Iowa, 85. The result attained is the restoration of the moneys illegally or erroneously paid by the taxpayer, and each fund continues as though these had never been collected. The remedy is perfect.
>
> "The duty of the board of supervisors is equally explicit. Having *ascertained* that the taxes have been illegally or erroneously exacted or paid, the statute prescribed precisely what shall be done, i. e., the board shall direct the treasurer to refund them to the taxpayer. Such an order is essential to repayment by the treasurer, and to enter it, *in a proper case*, is the mandatory duty of the board of supervisors. * * *." (Italics in the above case and following cases are ours.)

You will note that the Court used the word "ascertain" and ascertain means to find.

It occurs to us that the decision of the Court in this respect was a proper one and leaves no question of doubt as

to the meaning of Section 7235, but had not the court passed upon this matter in the case above cited, we think that a reading of the section would lead to no other conclusion without disregarding the proper definition of the word "found".

By the provisions of Section 7235 of the Code of 1927, Section 1417 of the Code of 1897, the Board of Supervisors were constituted and designated by the legislature as a special tribunal for the determination of fact questions involved in the application. We do not believe that it can be successfully contended that this was not the purpose of the legislature in enacting this section, especially is this true when read in the light of the decision above cited.

Yet notwithstanding the fact that the testimony shows that the claims were presented to the Board of Supervisors and by them disallowed, the petitioners then sought in an action of mandamus to review the decision made by the Board of Supervisors and asked the Court to issue an order compelling the Board of Supervisors to enter an order different than the one heretofore entered by them. (Printed Record Page 557, line 31 to page 558, line 12.) This, as we have heretofore suggested, without a showing as to what evidence was presented to the Board of Supervisors, or without an allegation that the Board acted fraudulently or arbitrarily.

It now becomes interesting and important to read the statute which defines one's rights in the extraordinary action of mandamus. Section 12440 of the Code of Iowa 1927 reads as follows:

> "Definition. The action of mandamus is one brought to obtain an order commanding an inferior tribunal, board, corporation, or person to do or not to do an act, the performance or omission of which the law enjoins as a duty resulting from an office, trust or station."

And Section 12441:

> "Discretion, exercise of. Where discretion is left to the inferior tribunal or person, the mandamus can only compel it to act, but can not control such discreion."

Prior to the enactment of the 1924 Code, Section 12440 and 12441 were contained all in one section and were not divided as we now find them, and read as follows:

> "Definition. The action of mandamus is one brought to obtain an order commanding an inferior tribunal, board, corporation or person to do or not to do an act, the performance or omission of which the law enjoins as a duty resulting from an office, trust or station. Where discretion is left to the inferior tribunal or person, the mandamus can only compel it to act, but can not control such discretion. * * *"

From a reading of the statute the natural inquiry presents itself as to what, if any, the difference is between discretionary acts and ministerial acts, and the most concise as well as the universally recognized distinction is best stated in Ferris on Extraordinary Legal Remedies, Section 206, and is as follows:

> "A ministerial act is one which a person performs in a given state of facts and in a prescribed manner, in obedience to the mandate of legal authority, without regard to his own judgment on the propriety of the act being done. The distinction between ministerial and judicial and other official acts is, that where the law prescribed and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment, the act is ministerial, but where the act to be done involves the exercise of discretion or judgment in determining whether the duty exists, it is not to be deemed merely ministerial."

Let us now turn to the decision of the Iowa court and we find that without any discord it has announced the rule

that where the duty imposed involves the exercise of discretion based upon the facts to be found, the same cannot be classed as a ministerial act and mandamus will not lie, however erroneous the conclusion reached.

Clark v. Board of Directors, 24 Iowa, 266.
Preston v. Board of Education, 124 Iowa, 355.
Griebel v. Board of Supervisors, 202 N. W., 379.
Riley v. City of Des Moines, et al., 212 N. W., 716.
Woodbury Co. v. Talley, 147 Iowa, 498.

The rule as stated in the *Preston* case is so clearly stated that we quote therefrom:

> "But where the duty imposed upon the board or tribunal involves an exercise of discretion based upon facts to be found by it, mandamus will not lie, however erroneous the conclusion reached; and upon this all the authorities agree. * * * Without question it was the right of the board in the instant case to determine the question of the residence of the plaintiff as a condition precedent to her admission to the schools as a free pupil. The determination of this question did not depend alone upon the age of the plaintiff. Of necessity other facts were to be considered. Conceding now that the board reached an erroneous conclusion, it is clear that the remedy was by a review of the facts and the judgment predicated thereon."

And in *Milwaukee Malt Extract Co. v. C. R. I. & P. Ry. Co.*, 73 Iowa, 98, our Supreme Court said quoting from High on Extraordinary Remedies:

> "Stated in general terms, the principle is that mandamus will lie to compel the performance of duties purely ministerial in their nature, and so clear and specific that no element of discretion is left in their performance, but that as to all acts or duties, necessarily calling for the exercise of judgment or discretion upon the part of the officer or body at whose hands their performance is required, mandamus will not lie."

And again in the case of *Griebel v. Board of Supervisors*, 200 Iowa, 143, this being an action in mandamus growing out of the power or the act of the board of supervisors in abandoning a portion of a drainage improvement, our Supreme Court in discussing the matter of when the writ of mandamus will obtain says:

> "Where officers have discretion, mandamus will lie to compel them to act, but not to control discretion. *Perry v. Board of Supervisors of Clarke County*, 133 Iowa, 281; *State v. Parker*, 147 Iowa, 69; *Sweitzer v. Fisher*, 172 Iowa, 266."

Section 4341 of the Code of 1897, reads as follows:

> "The action of mandamus is one brought to obtain an order commanding an inferior tribunal, board, corporation or person to do or not to do an act, the performance or omission of which the law enjoins as a duty resulting from an office, trust, or station. Where discretion is left to the inferior tribunal or person, then mandamus can only compel it to act, but cannot control such discretion." (Sections 12440 and 12441 of the Code of 1924).
>
> Under this section, we have repeatedly held that, where a positive official duty is enjoined upon the officer, the remedy of mandamus would lie. *State v. Thomas*, 152 Iowa, 500; *Benjamin v. District Township of Malaka*, 50 Iowa, 648.
>
> *Again, we have held that where the duty imposed involves the exercise of discretion based upon facts to be found by it, mandamus will not lie, however erroneous the conclusions reached. Clark v. Board of Directors*, 24 Iowa, 266; *Preston v. Board of Education*, 124 Iowa, 355.

Thus it is apparent that our courts have held if the act is discretionary, or one that must be determined by a finding of facts mandamus only lies to compel action to be taken, but not to control.

Also in *Woodbury Co. v. Talley*, 147 Iowa, 498 at page 506, the court said:

> "The authority to decide a disputed question implies the exercise of discretion, and this implies the right to decide it for or against the contention of either party. As an abstract proposition, the decision may be wrong, but the wrong is not to be righted by a writ of mandamus. *Meyer v. Dubuque County*, 43 Iowa, 592."

To the same effect is the case of *Charles City v. Ramsey*, 199 Iowa, 722.

Riley v. City of Des Moines, 212 N. W., 716.
Addison v. Loudon, et al., 222 N. W., 406.

The Court in the later case, which is a late Iowa case makes the following statement:

> "The officer (or board) to whom the duty of investigation and power of determination are committed is vested with executive and administrative duties, together with *quasi-judicial* power."

Reading from High on Extraordinary Legal Remedies, Third Edition, Volume One, page 50, Sections 42 and 43, we find the following:

> "Sec. 42. We come next to the consideration of a fundamental rule, underlying the entire jurisdiction by mandamus, and especially applicable in determining the limits to the exercise of the jurisdiction over public officers. That rule is, that in all matters requiring the exercise of official judgment, or resting in the sound discretion of the person to whom a duty is confided by law, mandamus will not lie, either to control the exercise of that discretion, or to determine upon the decision which shall be finally given. And whenever public officers are vested with powers of a discretionary nature as to the performance of any official duty, or in reaching a given result of official action they are required to exercise any degree of judgment, while it is proper by mandamus to set them in motion and to require their action

upon all matters officially intrusted to their judgment and discretion, the courts will in no manner interfere with exercise of their discretion, nor attempt by mandamus to control or dictate the judgment to be given. Indeed, so jealous are the courts of encroaching in any manner upon the discretionary powers of public officers, that if any reasonable doubt exists as to the question of discretion or want of discretion, they will hesitate to interfere, preferring rather to extend the benefit of the doubt in favor of the officer."

"Sec. 43. Illustrations of the rule and of its application are so numerous that it will suffice to indicate only a few of the more important. It will be observed that most of the cases in which the rule has been recognized and applied are cases in which the powers of the officer, as to the act sought to be coerced, were powers of a *quasi judicial* nature. *And when the official duty in question involves the necessity upon the part of the officer of making some investigation, and of examining evidence and forming his judgment thereon, a proper case is presented for the application of the rule.* * * *"

And reading further in the same work, Volume One, page 158, Section 141, we find the rule announced *relative to the refunding of assessments which rule is sustained by the great weight of authority in this State and the United States:*

"While, as has been shown in the preceding section, the writ may properly issue to set in motion officers intrusted with the correction of assessments, and to compel them to act upon an application properly presented, the courts will not interfere with or control the action of such officers when they have actually passed upon the application. The abatement or reduction of taxes improperly assessed, is, in such cases, essentially a judicial rather than a ministerial act. Hence it follows that when the proper officers have passed upon an application for the reduction of taxes, and have decided it adversely to the party aggrieved, they cannot be required by mandamus to alter their decision and to make an abatement in the tax. So when school directors have assessed a school tax, the writ does not lie to compel them to

discharge a taxpayer from payment of his portion of the tax, their power, if any, in this respect being discretionary."

PETITIONERS SOUGHT TO USE THE WRIT OF MANDAMUS AS A MEANS OF APPEAL OR AS A WRIT OF ERROR.

As it seems to us, drawing our conclusions from the cases heretofore cited, the petitioners sought to use the writ of mandamus as a means of appeal, or as a writ of error and we earnestly contend that this is not the province of a writ of mandamus. Ferris on Extraordinary Legal Remedies in discussing the question in Section 191 announces the rule as follows:

> "*Not an Appeal or Writ of Error.*—It may be stated here that mandamus may not be used to perform the functions of an appeal or writ of error and thus be used to review errors of law committed by a tribunal acting within its jurisdiction, however inequitable and inconsistent the ruling may be, whether the order be interlocutory or final."

And again in Section 299, in the same work the rule is announced:

> "*Not an Appeal or Writ of Error.*—Mandamus cannot in any event be used as a substitute for an appeal or writ of error to revise or correct alleged errors committed by a court in the proper exercise of its lawful jurisdiction, however inequitable and inconsistent the ruling may be. Where the law imposes upon a tribunal jurisdiction to pass on issues of fact, if evidence has been wrongfully excluded, or a wrongful conclusion of fact has been reached, and errors of law occur, it results from a mistaken judgment which can only be reviewed and corrected in a proceeding in error. * * *."

From a reading of the last two citations of standard works on Extraordinary Legal Remedies it becomes quite apparent that the writ of mandamus can under no circumstances be used as a writ of error, and the Supreme Court of the United States in the case of *Interstate Commerce Commission, Plaintiff-in-Error v. Merchants Association of New York*, 67 Law Ed., page 112, approved of this rule and laid down without any equivocation the doctrine that mandamus could not be so used.

PETITIONERS SOUGHT TO ATTACK THE DECISION OF THE BOARD OF SUPERVISORS IN A COLLATERAL MANNER.

From the authorities and citations heretofore presented we are confident that the only conclusions that can be arrived at are those for which we contend, and if we are correct in this assumption, then petitioners sought to use the writ of mandamus as an action to attack collaterally the correctness of the decision of the Board of Supervisors in the fact controversy involved. That it was a fact question is so plain and so apparent that we do not deem it necessary to enter into discussion of the facts as presented. As to the use of the writ of mandamus in this manner our Court has passed upon the same in numerous instances. Let us call attention first to the case of *Scripture v. Burns, et al.*, 59 Iowa, 70, where the court says:

> *It is averred in the answer that since the commencement of this suit defendants have at the official meeting of the school board, acted upon plaintiff's written request and refused to comply therewith.* Other allegations of the pleadings need not be recited. The District Court dismissed plaintiff's petition, requiring the defendants to pay all costs except the witnesses attending the term, and refused to hear evidence supporting

the allegations of the petition to the effect that the Catholic creed was taught in the school.

"The decision of the District Court was doubtless based upon the ground that the defendants had acted upon plaintiff's request, and that in this proceeding their action cannot be reviewed, and that as no demand required by Code, Section 3378, was alleged in the petition or shown by plaintiffs requiring them to forbid the teaching of the Catholic creed, the action cannot be maintained as to that branch of the case. The decision of the District Court is correct, and is well supported upon these grounds. *The proceeding by mandamus is intended to compel officers and others to act in the discharge of their duties and trusts imposed upon them. It is not designed to review their action when discretion may be exercised, or when it depends upon facts to be ascertained and determined by them."*

To this same end see *Sullivan v. Robbins,* 109 Iowa, 236.
Collins v. Board of Supervisors, 158 Iowa, 322.
Litell v. Webster County, 152 Iowa, 206.

PETITIONERS CAN NOT MAINTAIN THIS ACTION BECAUSE THE PROPER PARTIES ARE NOT BEFORE THE COURT.

The petitioners in their petition did not name as respondents the necessary parties.

State ex rel., Volunteer Relief Assn. of Wilmington v. Mayor and Council of City of Wilmington, et al., 118 Atlantic, 640.

Mandamus will not issue where it appears it will affect persons not before the court whose rights have not been determined in a previous suit.

Reinking, et al., v. Neol County Commissioners, et al., 185 S. W., 833.

These actions affect the State of Iowa, Polk County, the City of Des Moines and the Independent School District of

the City of Des Moines and none of them are made parties to this action.

PETITIONER'S REMEDY, IF ANY, AT LAW.

The Board of Supervisors having acted upon the matter, petitioner's remedy, if any, is certiorari. Section 12456, Chapter 533 of the 1927 Code, reads as follows:

> "When writ may issue. The writ of certiorari may be granted when authorized by law, and in all cases where an inferior tribunal, board, or officer exercising judicial functions is alleged to have exceeded his proper jurisdiction, or is otherwise acting illegally, and there is no other plain, speedy, and adequate remedy."

So it may be seen from a reading of this section that petitioners' remedy, if any, was by certiorari.

Gaffney v. Young, 200 Iowa, 1030.
Riley v. City of Des Moines, 212 N. W., 716.
Home Savings & Trust Co. v. District Court, 121 Iowa, 1.
Jewett v. Ayres, 167 Iowa, 431.
Woodbury v. Talley, 147 Iowa, 498.

Using the case of *Riley v. City of Des Moines* as an example: This was an action in mandamus brought by the plaintiff against the City of Des Moines, et al., including the Board of Trustees of the pension fund wherein the Board of Trustees of said Pension Fund had denied plaintiff a pension whereupon he brought an action of mandamus to compel the granting of said pension which order was granted by one of the Judges of the District Court of Polk County, Iowa. Our Supreme Court in a discussion of the right to the issuance of the writ of mandamus laid down the rule reversing the District Court of Polk County, Iowa, for issuing the writ, saying:

"Mandamus issues to compel, while certiorari issues to review, official or judicial acts. Mandamus will not lie where a remedy by certiorari is available."

In the case of *Gaffney v. Young*, 200 Iowa, 1031, another pension matter, the court determined that mandamus was not the proper remedy but certiorari was the sole remedy, stating on page 1032 the rule and quoting from *Home Savings & Trust Co. vs. District Court*, 121 Iowa, page 1, as follows:

"It seems to be fundamental that, when a new jurisdiction is created by statute, and the court or officer exercising it proceeds in a summary mode, or in a course different from the common law, and a remedy for the revision of its exercise is not given by the statute creating it, certiorari from a court having general superintendence and control over inferior jurisdictions will lie for its revision."

Now comparing the *Gaffney* case with the cases at bar do we not have the same situation, are they not in fact parallel cases? We have the legislature establishing a special tribunal of three to determine whether or not a particular person or persons were entitled to a pension, and the Supreme Court saying that it was a special tribunal established for the determination of the fact question and the remedy was solely one by way of certiorari.

In the case at bar under Section 7235 we have seen that the Board of Supervisors have been constituted as a special tribunal to determine the fact question as to whether or not the taxes were erroneously exacted. Yet, the Board of Supervisors having acted upon petitioners' petition and denied the same, they then come into court and claim by a writ of mandamus that they have the right to review the decision of the Board of Supervisors on the fact question. We contend there is no authority in this state which warrants them in this proceeding.

Before the Board of Supervisors would have been justified in directing the County Treasurer to make refund upon petitioners' claims, they would have to find from the facts adduced that moneyed capital in competition with banks had been assessed at a different rate than shares of bank stock and also that a relative material amount of moneyed capital was so used. It can not in our opinion be successfully contended but that where judgment must be found, based upon facts investigated or adduced the public officers or board in acting upon the same acts in a discretionary manner, and that while mandamus will lie to put the board in motion it will not lie for the purpose of controlling the action to be had.

We contend that the assignment in these cases on these petitioners was not an illegal assessment but at the most was only an erroneous assessment. The burden rested upon the Board of Supervisors to determine the question of fact as to whether or not other moneyed capital in a substantial amount was in competition with the banks.

The case of *Woodbury County v. Talley*, 147 Iowa, 498, to our mind clearly sustains our contention and announces the correct rule of law. In this case the Board of Supervisors employed a tax ferret and a controversy arose between the tax ferret and the Sioux City Stock Yard Company, a corporation, relative to the assessment of the property of the corporation and its shares of stock. It appeared that for the years 1903 to 1907 the assessor treated the corporation as a merchant, and did not list or assess any of the shares of stock either to the corporation or to the individual stockholders. As the Supreme Court in its opinion says "Whether this result was accomplished by argument or hypnotism does not appear". The tax ferret called the matter to the attention of the County Treasurer and notice was given the shareholders and a hearing was had. The County Treasurer held that there was nothing left to assess against

the Stock Yards Company or its corporate stock. No attempt was made to obtain a review of the decision of the County Treasurer by certiorari or otherwise. Later an action of mandamus was instituted by the County against the County Treasurer, to the petition of mandamus the County Treasurer filed a demurrer contending among other grounds that plaintiff's petition showed that the defendant County Treasurer had considered and determined the matter. The demurrer was sustained, appeal was taken and this Court in disposing of the case and sustaining the ruling of the lower court, discusses the province of the writ of mandamus, and the language of the Court so clearly states our position in this case that we adopt the same as our argument.

From a reading of the foregoing case can one arrive at any other or different conclusion than that the petitioners' remedy is not by way of mandamus? It can not be said successfully, that the filing of a claim before the Board of Supervisors regardless of what was in the claim, would compel the Board of Supervisors to accept the same as entirely true and if they refuse the claim after an investigation and after a hearing on the facts, that it permits the petitioners or claimant to go in to a court of equity, trying an issue of fact before the court without a jury and thus attempt to reverse the decision of the Board of Supervisors.

Let us assume that the petitioners filed their claim with the Board of Supervisors, and instead of disallowing the claim in its entirety, the Board allowed a part thereof. Could it be said that the claimant could bring an action in mandamus to compel the Board to increase the allowance to the full amount claimed?

Therefore, for all of the foregoing propositions we earnestly contend that petitioners had no right to maintain their action of mandamus under the pleadings and under the facts as disclosed by the record.

MANDAMUS WILL NOT LIE TO COMPEL THE PAYMENT OF MONEY BY PUBLIC OFFICERS IF THERE IS NO FUND OUT OF WHICH IT CAN LEGALLY BE PAID AND THE BURDEN IS UPON APPELLANTS TO ALLEGE AND PROVE THE EXISTENCE OF THE FUND.

Woodcock v. Board of Education, 10 A. L. R., 181, 27 Cye., 1131.
Iowa Ry. Land Co. v. Woodbury Co., 64 Iowa, 212.

In this case there is no showing made that there is any money on hand for the repayment of the claim of petitioners if the same had been ordered by the court, and Corpus Juris, Vol. 38 at page 770, Section 412 lays down the rule as follows:

> "Mandamus will not issue to compel the payment of a claim against a municipality where no appropriation has been made for such payment, or where there are no funds on hand applicable to the payment of the claim, and funds appropriated for one purpose will not be compelled to be devoted to another."

The undisputed testimony in this case shows that the money paid in has been distributed to the State and subdivisions thereof entitled thereto, and that in making the levies for each year only so much is levied as is necessary for carrying on the governmental expenses, so that if this is a correct rule, before petitioners would have been entitled to recover it would be necessary for them to show that there were funds on hand not appropriated or devoted to any other purpose in a sufficient amount to satisfy their claim if sustained. The Supreme Court of the State of Iowa in the case of *Rice v. Walker*, 44 Iowa, 458, recognized this rule:

> "A writ of mandamus will not issue commanding an officer to do what is not within his power to do. If he

has put it out of his power to do his duty, he may be liable to damages to one prejudiced by his act, but in such case mandamus will not lie."

Then again Section 12452 of the Code among other things provides that the order of mandamus shall be returnable forthwith:

"* * * and no return except that of compliance shall be allowed."

Recognizing the fact that a court will not issue an order that it cannot compel the enforcement of, it seems to us that from a consideration of this section there can be no question but that the burden of proof of showing that these respondents could comply with the order, if issued, was upon the petitioners and this proof they did not meet. The reason for the necessity of this proof and of this showing, it seems to us, is clearly stated in the case of *Farson v. Baird*, 63 Law Ed., 233, where the Supreme Court of the United States said:

"Mandamus would be useless if he did not have funds on hand with which to pay and the courts never do the useless thing of awarding a mandamus which could not be obeyed."

PROPOSITION II.

Remedy is by Appeal.

The Supreme Court of Iowa has held in numerous cases involving questions identical with those in the case at bar that the exclusive remedy of the taxpayer is by appeal to the board of review. It has so held in the case at bar as to the individual assessments and in numerous other cases cited in our brief.

This honorable Court has held in substance that where the laws of the state create a board or tribunal, such as the board of review created by the laws of Iowa, for the correction and equalization of assessments, and provide that the taxpayer aggrieved may apply to such board for the correction of errors, and confer jurisdiction upon the board so to do, that the decision of the Supreme Court of the state determining that the remedy by appeal to such board is exclusive is binding upon this Court, and raises no federal question. *Railway Company v. Patterson*, 154 U. S. 130; 14 S. Ct. 977.

In a case submitted to this Court from the Supreme Court of Iowa, to wit, *First National Bank v. Anderson*, 269 U. S. 341, the question of the taxpayers' remedy was first raised in this Court and was not raised in the Supreme Court of Iowa or the District Court of that state. This Court in the cited case said:

> "The Supreme Court of the state treated the case as cognizable in equity and perceived no obstacle to a consideration of the merits as displayed in the petition. In this that court was proceeding within limits where the state laws and practice were controlling, and its action is not open to revision here."

Thus this honorable Court has recognized that the decision of the Supreme Court of Iowa was final on the question of remedy. Subsequent to the decision of this court in *First National Bank v. Anderson, supra*, the Supreme Court of Iowa has in the cases cited in our brief held that the taxpayers' exclusive remedy is by appeal. Under the decisions of this Honorable Court, to which we have heretofore referred, and as contended in our brief, the decision of the Supreme Court of Iowa on this question in this case is conclusive.

The leading decision of the Supreme Court of Iowa on this proposition is that of *Griswold Land & Credit Company v. Calhoun County*, 198 Iowa, 1240, 201 N. W. 11. The rule announced therein has been repeatedly reaffirmed by the Supreme Court of Iowa down to and including the decision in the case at bar. It is especially to be noted that the remedy which the petitioner in the case at bar contends is not adequate, was followed by not only state banks but national banks by appeal from the board of review. *First National Bank v. Board*, 199 Iowa, 1124, 201 N. W. 769; *First National Bank v. Board*, 200 Iowa, 131, 204 N. W. 223; *Lamont Savings Bank v. Luther*, 200 Iowa, 180, 204 N. W. 430; *First National Bank v. Board*, 199 Iowa, 1124, 201 N. W. 269. The remedy afforded by the statutes of Iowa, which the Supreme Court of that state has held is exclusive, has been found to be adequate by other national banks who raised the very question presented by the petitioner in the case at bar. If the remedy thus afforded is adequate for other national banks and state banks, it is adequate for the petitioners.

In addition to the fact that other banks have found the remedy afforded by the statutes of Iowa to be adequate, the record in the case at bar discloses that the petitioner banks knew, long before the board of review passed upon the assessments and certified the same to the county auditor, what their position was in regard to the classification and assessment, not only of their stock, but the other taxable property in the taxing district as well, and they at that time, with this information and knowledge, could have presented the identical question now raised.

It is contended that the petitioners had no ground for complaint or appeal to the local board of review, for the reason that the assessor had correctly listed and classified the stock of corporations whom the petitioners now contend were in competition with them, and therefore there was no ground for contesting the classification of the bank stock

on the basis of discrimination. In making this claim, however, they overlooked a class of property which they contend is moneyed capital in competition with bank stock,—that is notes and mortgages in the hands of individual citizens. This class of property was listed and classified by the assessor as moneys and credits and not as moneyed capital. The petitioners not only knew of this fact but aided and assisted the assessors in thus listing and classifying a large part of this property owned by individuals. The Iowa Supreme Court has held in this case that if, as contended by petitioners, this class of property was erroneously assessed and classified, their remedy was by appeal from the local board of review. No change was made in the classification of the notes and mortgages in the hands of individuals from that made by the assessor and confirmed by the board of review. The petitioners' remedy, if their contention be correct, was clearly that afforded by the statute of appearing before the local board of review and appeal.

Considering the class of property consisting of the stock of corporations which the petitioners contend were in competition with them and that they reason should have been classed the same as bank stock, viz. moneyed capital, we wish to refer to the opinion of the Supreme Court of Iowa in the case at bar wherein it is pointed out that this class of property was assessed and classified in the manner which the banks contend is the proper and lawful manner by the only official and board authorized to classify and assess property. The change made in the classification of this property was by the county auditor, whose act was unauthorized, illegal and void. The state or the municipalities thereof are not bound by such illegal act, and the petitioners cannot rely upon the illegal and unauthorized act of the county auditor to avoid the payment of their taxes. As the Supreme Court of Iowa pointed out, the taxes upon this class of property are unpaid. The state or the municipalities

thereof, through the proper taxing officials, have authority, and it must be presumed that public officials will perform their duty, to collect such unpaid taxes.

The record in the case at bar shows that the petitioners through their officers, were fully advised of the action taken by the county auditor in making the change in classification. They stood by and permitted these illegal and unauthorized acts to continue without availing themselves of the remedy provided by statute through certiorari. *First National Bank v. Weber*, 196 Iowa 1155, 1163, 1164, 192 N. W. 890. They thus became parties to the illegal act which they now seek to take advantage of to avoid the payment of their taxes.

PROPOSITIONS III AND VI.

Was There Competing Capital Not Taxed as National Banks Were Taxed?

This question was rather fully argued before the Supreme Court of Iowa, both by the petitioners here and the respondents here. However, in the argument here, the petitioner on this question says, "In view of the decision of the Court below, a recitation of the evidence which abundantly lists the existence of monied capital is unnecessary". We are unable to grasp the petitioner's stand in this matter for the lower Court did not conclude that there was competing capital and we believe that it is an absolute distortion of plain language to attempt to construe the Court's decision otherwise. The Supreme Court of Iowa said, "During these years, there were in the City of Des Moines a large number of persons and a few corporations who, *as we shall assume*, were employing monied capital in competition with plaintiffs". This can only be construed as meaning that the Supreme Court does not pass on that question as a fact, but assuming, for the purpose of the argument, the petitioners—plaintiffs

below—still were not entitled to the remedy. That fact issue then is before this Court, and we believe by the attitude of the petitioners in their argument (page 13) they have abandoned this contention because they give this Court no support.

We are truly tempted also to abandon argument on it, but because the matter is important and perchance the Court may consider it, we do submit the argument on that proposition.

In order to arrive at a basis of discussion, we look to Section 5219 of the Revised Statutes of the U. S. to determine *ON WHAT CONDITIONS ARE NATIONAL BANKS TAXABLE?*

We take the statement that "The consent of Congress to the taxation of the property and share of National Banks was evidenced by Section 5219" (Pet. Brief 37) as our starting point. To this consent the Congress has attached by Section 5219 TWO PROVISIONS ONLY:

> a. Not a greater rate than assessed upon other moneyed capital in the hands of individual citizens; and
> b. Shares shall be taxed where bank is located.

This provision (a) must be the basis of petitioner's contention and what that provision means is a controlling element in this case.

We agree then with petitioner that a determination of the meaning of that phrase "moneyed capital" is all important. Our courts have stated the following rules relative to this phrase:

> "The restriction applies as well where the competition exists only with respect to particular features of the business of national banks or where moneyed capital is employed, substantially as in the loan and investment features of banking, in making investments by way of loan, discount or otherwise in notes, bonds or other se-

curities, with a view to sale or repayment and reinvestment." *First Nat. Bank of Hartford v. City of Hartford,* 273 U. S., 548; 71 L. Ed., 767.

And this expression has been amplified in many cases but always the decision centers around the necessity of "competition," "substantially as in the loan and investment features" of national banks. In support we cite every case listed in petitioner's argument.

We must then all admit, *THERE MUST BE COMPETITION* and *WITH SUBSTANTIALLY SAME LOAN AND INVESTMENT FEATURES OF NATIONAL BANKS.*

Accordingly, we ask, WHAT ARE THE FEATURES OF NATIONAL BANK INVESTMENT AND LOANS? and

WHAT IS COMPETITION?

To determine what are the features of national bank loans and investments we may look to Federal legislation and we find regulations as to the features.

We quote from Ch. 461, 39 Statutes at Large, 754, Sec. 24, now Sec. 371, Title 12, Code 1926. From this, petitioner assumed blanket authority to make real estate loans.

Note these required conditions, quoted:

(a) Improved farm land.

(b) Unincumbered farm land.

(c) Upon land within Federal Reserve District. Within 100 miles of Des Moines.

(d) Limited to five years.

(e) Not in excess of 50% of actual value.

(f) Real estate within 100 miles not farm land.

(g) Not more than one year.

(h) Not in excess of 25% of capital or surplus or 33% of time deposits.

(i) Not in excess of 50% of actual value of security.

All such loans were limited in the aggregate to 25% of its capital and surplus or to 1/3 of its time deposits.

Before a company or individual shall be competing—with a "national bank" it must have its capital "employed substantially as in the loan and investment features of national banks." (*First Nat. Bank of Hartford v. City of Hartford, supra.*)

Now then, let us take some of the companies listed by the petitioner in its various tabulations.

Let us discuss the business of the various corporations, twenty-seven in number as to which evidence was taken.

In the statement of facts of this brief is a statement of the testimony relating to the business of each of these institutions. We have attempted in our abstracting the testimony to be accurate and if the Court or our opposing counsel discovers we are in error we stand corrected. We give to the petitioner's counsel credit for the same good intentions, but we find they are inclined to interpret—probably unconsciously guided by the spirit of the old adage "the wish is father of the thought,"—the testimony as they "wish" it to be rather than we believe it is. To make verbose quotations from the record would render no assistance to the Court, yet because of the importance of the case, the amounts involved and the principles of law to be established or followed, we are not justified in failing to be respectably thorough in our discussions.

Directing the Court's attention to Sec. 371, U. S. Code, 1926, above digested and to other bank regulations to be referred to, we attempt to distinguish between the corporations claimed to be in competition and the petitioner bank as to the substantial features of the employment of the moneyed capital.

The Security Loan & Investment Company, instead of limiting its loans to 50% of the value, had a habit of dividing loans—because they were larger than the 50 per cent

theory—into several notes, being one which represented a first class mortgage loan amount, and then the rest divided into smaller notes, which smaller notes were sold subject to the larger note, but all secured by the same mortgage. (Tr. 310.) (Page 1102 of printed record.) These, that is, the notes, which became equivalent to second mortgages, amounted to $300,000 to $350,000. The notes also bore a higher rate of interest and a portion of the interest rights was retained as commission. (Tr. 311.) (Page 1102 of printed record.)

The assessable net assets of the company January 1, 1919, given as $84,619 is the equivalent of its then capital and surplus. This amount was practically equalled by cash on hand $59,000, and Liberty bonds $19,100. The entire balance of all assets, loans, etc., about $540,000 was offset by moneys borrowed from the banks on which interest was being paid. (Tr. 316-317.) (Page 1103 of printed record.)

In 1920 the capital was $50,000 and surplus $14,000. At that time the company owed $700,000 to the banks and were paying interest. (Tr. 322.) (Page 208 of printed record.)

On January 1, 1921, the capital stock had increased and there was a loss and no surplus, and all the assets of $800,000 above the capital and surplus of $109,985 represented moneys borrowed from the banks on which interest was paid on $800,000.00. (Tr. 326.) (Page 208 of printed record.)

On January 1, 1922, $700,000 of assets represented moneys borrowed from the banks for which interest was paid, while the capital and surplus was $133,619. (Tr. 237.) (Page 208 of printed record.)

From these bits of testimony, we find in each case the actual capital used in making the loans was capital of the banks and the banks were being paid the interest and held the mortgages as collateral security. (Tr. 323.) (Page 1103 of printed record.) In other words, in the mortgage busi-

ness, the company instead of being a competitor was a broker or customer for the benefit of the bank. It made loans which banks could not make and by the company's method of operation reduced loans to a form acceptable to the banks as collateral and increased the business of the bank, rather than competing with it. It benefited the bank by keeping the bank's money operating on short time obligations and ready customers for its loans. If the company competed with the bank under these conditions, an automobile paint contractor would be in competition with the paint manufacturer, even though the contractor did work the manufacturer could not do and the contractor purchased his paint from the manufacturer. The job would be undone, unless there were some one to apply the paint. The bank's money would be idle if there was not a machine such as the Security Loan & Investment Company to accomplish what the bank could not do, and by that very accomplishment keep bank funds from being idle.

In addition to this, the Company guaranteed its second mortgages, advanced moneys to construct houses, financed the promotions of subdivisions, all of a type of business the bank could not and would not do. Is this competition, or are the banks "dogs in the manger"?

IOWA INVESTMENT & MORTGAGE CO.

This company was merely a broker, sometimes taking second mortgages for commission. Loans were for 142 months and of the Prudential Insurance Company money. If the mortgage company made advancements, it borrowed money from the banks. (See Statement of Facts of this argument for a fuller statement of its operations.) None of this was business the banks could do.

DES MOINES MORRIS PLAN.

This company was organized to do business with people who had no credit at the banks and to defeat the loan sharks. It loaned on two or three name paper not secured and loans averaged less than $200.00 payable in installments extended over one year. It bought installment contracts in the form of trade acceptances for washing machines, carpet sweepers, etc. The company is not a bank. (Page 254 of printed record.)

None of these types of business did the bank want and none of them could they do.

It is repetition of testimony to try in this way to digest the twenty-seven companies claimed to be competing but we took the three in the order named to show the Court that according to petitioner's witnesses the companies are non-competing. We refer the Court to our Statement of Facts of this argument for a resume of the testimony concerning all these companies.

With special reference to Joint Stock Land Banks, we submit:

Petitioner contended in the state court that these companies are competing with National banks. Their argument is anticipating what we have to say. Generally they say, the passage of the Federal Farm Loan Act, recognized the created institution as in the competing class of National banks.

This does not at all classify the Joint Stock Land Bank as in the same "moneyed capital class" as the National banks, but gives to the Joint Stock Land Bank the same protection as is given national banks against discrimination in favor of capital "employed substantially as in the loan and investment feature of" joint stock land banking.

(*First Nat. Bank of Hartford v. City of Hartford*, 273 U. S. 548.

First Nat. Bank of Guthrie Center v. Anderson, 269 U. S., 341, 70 Law Ed., 303.)

The Congress knew a concession of right to tax was necessary and enacted the reference to 5219, so as to protect the "joint stock land bank" against "other moneyed capital" "employed substantially as in the loan and investment features" peculiar to "joint stock land banks." This is so evident as to hardly justify a statement.

Instead of coming to the conclusion the petitioner's counsel propound, the very fact that a special act was prepared for "joint stock land bank" operation, shows Congress recognized there are many diverse types or classifications into which moneyed capital goes, and that the class of "joint stock land bank" investment was of "a substantially different type of loan with peculiar investment features" distinguishing it from "national banking" features—therefore, a special act and special enactments. Otherwise, a mere amendment would have served the purpose, but no, a "national bank" as such cannot make "substantially" the loans with the "investment features" of those made by the "joint stock land bank." That is the difference and that's why the plaintiffs were basically in error both in reasoning and as to including the two in the same class; and $490,814 in 1920, $424,969 in 1921, and $467,725 in 1922 of plaintiff's claimed competing "other moneyed capital" fades out of the picture.

In fact, we think that only in rare cases is there any evidence of even a substantial transaction by any of the alleged competiting corporations being done in the manner or method followed by banks or that the investment had the "features" of loans and investments as made by banks. That is, when the entire transaction is considered. As an example, a customer needing $11,000.00 is unable to get it at the bank, because his security is only $15,000.00. He ceases to be a bank customer. Instead he goes to one of the companies complained of by plaintiffs. He there obtains $10,000 but, how? He is given a first mortgage loan of $9,-

000.00 on an actual 60% basis, it too often proves to be, or 50% appraised basis of the security and $2,000.00 second mortgage. The $9,000.00 mortgage is deposited as collateral to a loan at one of the banks, legally, properly and to the bank profitably. The $2,000.00 loan is carried by the company and to resort to vernacular "and how long". This, the petitioner says, is "competition". This, we say, is non-competitive but instead a business production for the fortunate bank.

The banks seem to think they have a monoply on "credit". That any individual or institution using "credit" or giving "credit" is in "competition". That is not in keeping with the facts nor the law. It will be noted, the decisions do not say that competitive "individuals" are those making "loans or investments" but those "where money is employed substantially as in the loan or investment features of banking". It is the banking "features" which designate the similarity and not "investment" nor "loan" nor "credit".

Note Mr. Grant McPherrin, president of petitioner, Central State Bank, testifying thus, "A customer who bought a real estate mortgage of the bank, thereby became a competitor of the bank. An individual by becoming a customer became a competitor" and he further opines, "A clothier who extends credit to a buyer of a suit for payment on the installment plan is a competitor." (Page 1179 of printed record.)

It is this same thing running all through the bank's testimony and the only thing they have proven, that is, a great share of business is done on credit. The banks entirely miss the "investment features" except these: (1) a loan; (2) due date; (3) signed evidence of indebtedness, but they do not try to parallel these "banking features": (1) Limit to credit; (2) Limit of time of maturity; (3) Hazard of the loan; (4) Receipt of depositor's money; (5) Bankable quality of paper.

McPherrin says if a man could buy an automobile only on credit by a collateral mortgage or conditional bill of sale and he had to borrow the money from the bank, he wouldn't buy the automobile. On the other hand, he says if one does loan the money on such conditions, as a bank would not, and the sale is thereby consummated, that is an "investment" with the "investment features of banking". Practically the same thing was said by Capps, Slininger, Crawford and McKee and it stamps the character of the bank's contention as to what is "competition" and the value of their judgment as to what is "competition".

Not a bank loaned money to any person with a direct chattel mortgage on the automobiles and where payments were contracted for on installments. (Page 1177 of printed record.)

In discussing the facts as disclosed by the evidence to determine whether included in the term "other money capital" as used in Section 5219 of the Revised Statutes of the United States, definitions have been quoted by counsel for petitioner in their "brief and argument" and with these contentions of fact attempting to avoid discussion of law, we extract from those quotations the tests of "other moneyed capital" stated by the courts, and upon which petitioner relies.

1. *It "does not mean all capital,* the value of which is measured in terms of money". —.

2. It "is the nature of that employment which constitutes it in the eye of this statute 'moneyed capital' ", i. e., "operations in which the capital invested in national banks is employed".

3. It "includes shares of stock * * * in all enterprises in which the capital employed * * * is money."

4. "It includes money, in hands of individuals employed in a similar way invested in loans or in securities for the repayment of money."

(*Mercantile National Bank v. Mayor,* 121 U. S., 138; 30 L. Ed., 895.)

5. It includes "investments of individuals in securities that represent money at interest and other evidences of indebtedness such as normally enter into the business of banking".

6. But it does not include "shares of stock in corporations that do not enter into competition with national banks".

(*Merchants National Bank of Richmond v. City of Richmond*, 256 U. S., 635; 65 L. Ed., 1135.)

"Competition" money as used is defined in decisions quoted by counsel for petitioner.

It is in competition:

7. "Where it is invested in shares of state banks or private banking."

8. "Where it is employed substantially as in the loan and investment features of banking, in making investments, by way of loan, discount or otherwise, in notes, bonds or other securities with a view to sale or repayment and reinvestment".

(*First National Bank of Guthrie Center v. Anderson*, 269 U. S., 341, 70 L. Ed., 303.)

9. Only where "there is a *clear showing* of such competition, *relatively material* in amount".

(*Merchants National Bank of Richmond v. City of Richmond, supra.*)

10. Only where "capital, *substantial in amount* when compared with the capitalization of national banks, is employed * * * in the *same sort of transactions* as those in which national banks engage and in the same locality in which they do business".

(*First National Bank of Hartford v. City of Hartford*, 273 U. S., 548, 71 L. Ed., 767.)

"The language of the Act of Congress is to be read in the light of this policy" * * * "The main purpose * * * of

Congress * * * was to render it impossible for the State, in levying such a tax, to create and foster an *unequal* and *unfriendly competition*, by favoring institutions or individuals carrying on a *similar business* and *operations* and *investments* of a *like character*".

(*Mercantile National Bank v. Mayor, supra*) and

There will be no remedy, unless "the capital thus used could readily be carried to a point where the business of national banks would be seriously curtailed".

(*First National Bank of Hartford, supra.*)

"Undoubtedly, there may be much personal property exempt from taxation without giving bank shares a right to similar exemption, because personal property is not necessarily moneyed capital."

(*Evansville National Bank v. Britton*, 105 U. S., 322, 26 L. Ed., 1053.)

We discuss the facts then, not unmindful of the law nor with an effort to evade the law as prescribed by Congress and as pronounced by the Supreme Court of the United States, but fully cognizant of it. However, by assuming the law of this case to be as contended by petitioner, we believe as a fact proposition the plaintiff has failed to establish "other moneyed capital" "relatively material" "substantial in amount" "when compared with the capitalization of national banks" "in the same locality" "employed in the same sort of transactions as those in which national banks engage" to be taxed different from the national banks so as to create or tend to "create and foster an unequal and unfriendly competion" or that the "business of national banks would be seriously curtailed".

The argument of petitioner that "the mere fact that competing corporations handled the loans in a *slightly* different

form is utterly immaterial", is not to be taken as either logical nor in accordance with law. Immediately following the contention quoted the petitioner urges as a result that a corporation engaged in the business of purchasing installment contracts from automobile dealers supplies the capital needed by the dealer to carry on his business, and obviates the necessity of borrowing from the banks, ergo it is a competitor. Not at all. The test is not that the "necessity of borrowing from banks is obviated".

If I pay my bills, I obviate the necessity of my creditor borrowing from the banks. If I am a wholesaler and sell on credit, I obviate the necessity of my debtor borrowing from the banks. Under such a test, if I pay my bills or if I sell on credit, I am a competifor of the banks. Such logic could be carried on *ad absurdum*. However, a little thing like that makes no difference to the petitioners, because they deliberately go that far. Witness, the bank president, giving his expert testimony on what is competition with a bank. Mr. Grant McPherrin, president of the petitioner Central State Bank, testifies:

> "We bought bonds because they were quick assets, and we could find a ready buyer and I consider a buyer as competitor."

Also:

> "We sold mortgages to our customers."
>
> Q. And if the customer bought a real estate mortgage of you, did he thereby in your judgment become a competitor of yours?
>
> A. Naturally I would consider him a competitor.
>
> "In other words, the individual by being our customer became our competitor." (Page 1179 of printed record.)

How strange. If you do not use the bank—you are in competition. If you use the bank, you are in competition.

With such absurdities, it cannot be possible the law agrees. Positively then, the test is not that you do or do not use the bank.

The courts have repeatedly said competition is where the money is used in the "same sort of transactions" "substantially as in the loan and investment features of banking."

It is only the "same sort of transactions" with "substantially" the same "features" that must be present.

Let us discuss the types of alleged "competing business"—

AUTOMOBILE SALES.

A company making sales of automobiles and taking a collateral mortgage on the automobile with installment payments, would be in competition with banks, according to Mr. McPherrin, yet "If he could only buy an automobile on that basis and he had to be financed by Mr. McPherrin's bank, he would not buy the automobile." (Page 1177 of printed record.)

It is on such testimony that the petitioners base their contentions that a company buying such paper was a competitor, while the banks in no instance bought such paper but loaned money to houses making such sales of automobiles. The same is true of other commodity sales to which reference is made by appellants in their argument.

The transactions of banks and the sales companies or their backers are not of the "same sort" nor having the "same features."

Not a bank *bought automobile* paper.

Not a bank *bought* automobile paper endorsed "without recourse."

Not a bank made *installment* collections of automobile paper. "It was not the general banking practice to handle

such paper." (Capps p. 366, lines 12-13; Denial Abst. p. 59, line 11.) (Page 496 of printed record.)

The banks (a) *loaned money* to automobile dealers, (b) took a note, (c) of demand sixty or ninety days only, (d) took collateral security sometimes but not installment contracts, and (e) did not own the purchasers' notes or mortgages.

The so-called "competing automobile finance companies" did not (a) loan the money to automobile dealers, (b) did not take a note, of (c) short time or other time, (d) did not take collateral, but (e) bought and owned the automobile paper including the installment contract. They bought with endorsements "without recourse" and took their pay in installments.

The transactions were neither of the "same sort" nor did they have the same "features". Neither did it divert business from banks for with the banks "the automobile would never have been sold". It did increase bank business for banks financed by the "competing (?) finance companies." (Abst. p. 169, lines 20-21.) (Page 299 of printed record.)

CATTLE LOANS.

This type of loan the banks call "competing". The United Cattle Loan & Livestock Corporation is cited as typical competitors. Let us see. The testimony relative to this company is in the Abstract pages 170-171, 187-193, and Denial Abstract pages 27-29.) (Pages 300 and 317 of printed record.)

> "The loans were all secured by chattel mortgages which were first liens upon cattle. Most of the loans were on ordinary feeder stock and ran from sixty days to six months." (Abst. 170, lines 31-2 p. 171.) (Record 300.)

The banks have not testified to a single loan made on security of cattle. The Iowa National Bank bought such paper unqualifiedly endorsed by the Financing Company. In the petitioner's tabulation, however, as to bank business they include notes of country banks, secured by collateral notes secured by the cattle endorsed by the borrowing bank. The estimates of amounts of money so furnished country banks and by them used in making cattle loans is pure guess on the part of the banks. (Tr. 2127-28.) (Page 503 of printed record.) The distinguishing "features" between the "competing business" and the banks are principally these:

a. The banks did not even meet the cattle man.
b. The bank did not loan to the cattle man.
c. The bank loaned the company or cattle finance company.
d. The bank took as collateral, not cattle or stock, but the endorsed note and endorsed mortgage as collateral.

The reverse is what the company did. These very things, the hazard of dealing with cattle borrowers, the number of borrowers, long time quality are things the banks want to avoid, and instead of loan companies being competitors they are relieving the banks of the undesirable features and making it possible to increase the business quantity of the bank.

FINANCING PUBLIC IMPROVEMENT CONTRACTS.

The contention that such business was done by banks and by "competing corporations", must be borne out by more than statement of counsels' contention and must be borne out under the rules of law as to "similar features" and transactions of the same "sort".

Let us take the Iowa National Bank as an example as to how this business was done by them.

In his direct testimony Mr. Capps very definitely states "The bank advanced funds to such contractors for the purpose of defraying expense if the work, having (a) an agreement with the contractors (b) for the purchase from them at a stated price of public improvement certificates or bonds, which (c) they might receive in connection with the work". (Abst. 334, line 30-line 1, page 335.) (Page 464 of printed record.)

However, on cross examination, we get quite a different story. It is this:

(a) Money was advanced on the borrower's notes, (b) which were "demand or for a period of two to three months" and (c) he only thinks there was an agreement to take the public securities, but (d) the notes were secured by an assignment of the contract and a bond to complete the work (Transcript 2350-2351.) (Page 509 of printed record.)

Let us now take the Bond & Mortgage Company of Iowa as typical of the alleged competitors for this business.

"During the progress of the work the company would provide funds to enable the contractor to proceed with his work to meet his payrolls, pay for his material, freight bills and things of that sort, and then when the work was completed the bonds were turned over."

"We usually made these arrangements—to finance the work,—by taking an assignment of the contract and the proceeds to be delivered, before the work was begun. This took eight or nine months."

These "features" are vitally different. The bank had short liquid notes. There was no agreement shown. The contract was collateral security.

The company did not have short paper, did take the contract assigned to it and the proceeds went to the company. This was not security, it was co-operative dealing in the contract.

The banking business was increased because the company borrowed from the Valley National Bank, put up collateral for the loan and told the bank why they were borrowing and the bank did not complain, and knowingly, for the purpose of increasing the corporation's business, permitted the corporation to borrow without any complaint and wished the corporation success. (Page 305 of printed record.)

How can this be competition? It made possible credit circulation with the features the bank could not, but it increased bank business.

MORTGAGE & INVESTMENT COMPANIES.

This type of company is complained of by petitioner as competing. It is true some companies made farm loan mortgages and some banks made farm loan mortgages. The distinguishing "features", however, seem to be the things which the petitioner has full capacity to ignore.

In another part of this argument, we refer to 1926 U. S. Code Section 371, Title 12, setting forth the conditions under which national banks can make farm loans. By reference and to prevent repetition, we here adopt all that is there said.

Petitioner claims in its argument that the Iowa National Bank in one year carried $750,000.00 in farm loans for the Bankers Life Company for a period of approximately three months.

In 1919 it was a provision of the national Banking Act that a national bank could not have in excess of 25 per cent of its capital invested in real estate loans at one time. As to the Iowa National Bank in 1919 $750,000 would be far in excess of one-fourth of its capital. Still on Exhibit "H", the Iowa National Bank's statements of Real Estate loans by it in 1919 includes $760,000 of the Bankers Life Company real estate mortgage investments. (Tr. 1954.) (Page 1141 of printed record.)

However, the notes and mortgages were transferred to the bank and held by them, not until paid, but until the Bankers Life Company took them up again for their own investment. The Bankers Life Company had an agreement so to do.

The agreement was made with Homer Miller as president of the Bank (Tr. 1953). In fact the agreement was in the nature of a *demand* loan with collateral security and *"demand"* was recorded on the ledger card Exhibit "G". The account was paid out March 1, 1919, and ran from $67,000.00 and up to $760,000.00. The Iowa National Bank did not collect nor sell a single one of these mortgages. During these years the bank "made many loans with real estate security as collateral". Note the evasion of the bank on this proposition:

In other words the bank loaned the money to the insurance company and took the mortgages as collateral. If, however, this had appeared as a straight loan it would have been illegal as being more than ten per cent of the capital and surplus, therefore they camouflaged it as above.

> "Q. So that as a matter of fact, what you claim was buying loans from the Bankers Life Company was merely a substitute for extending them credit so as not to get in conflict, if possible to be avoided, with the Acts of Congress and the rules of the controller, wasn't it?
>
> A. My answer is that we did carry them."
> (Printed record page 1141.)

How ridiculous for the Bank to say they invested in Real Estate loans and then to say Real Estate loaning companies were competitors, and to use the Bankers Life Company mortgages as an example of the investment of the bank and also as evidence that the Bankers Life Company was a competitor.

They might well say for it is the same logic (?) "When they loaned money to a shoe factory to operate its business, and the note was secured by a warehouse receipt for shoes, the bank's money was invested in shoe manufacturing. As a consequence the money invested in shoe manufacturing is 'competing'."

If this sort of argument by them be carried to its conclusion all capital is "other moneyed capital" and the decision of the U. S. Supreme Court quoted by our learned adversaries:

> "Undoubtedly, there may be much personal property exempt from taxation without giving bank shares a right to similar exemption, because personal property is not necessarily moneyed capital." (*Evansville National Bank v. Britton, supra,* cited by appellants their argument page 31)

is repealed by petitioner.

This drives us back to a same view of "moneyed capital" with "same features" as used by National Banks. It must mean what it says. Feeders of business and customers of business to and with the National Banks must not thereby be construed to be competitors. It is when they draw business away and when "the business of national banks would be curtailed." (*Mercantile National Bank v. N. Y., supra*) that competition arises and not until then.

It was impossible and illegal for the banks to make this quantity of real estate loans and in fact to make the most of them, but their banking business and ramifications could be and were legitimately increased. And this is competition?

SMALL LOANS $300 AND UNDER.

The banks have furnished lists of numbers of loans they have made in amounts of $300 or less and claim this type of business is competitive with the so-called small loan companies. Let us inquire.

The loans made by the small loan companies were made on security of household furniture or such collateral and paid in installments. The time of payment was either weekly or monthly over a period of six to ten months, and to those who had no credit at the banks.

The banks would not take the furniture or other chattels as securities, had no installment notes, and did not cater to this business. If their notes were paid in installments, it was because notes were not paid when due and extension of time had to be given in order to collect. Never was this done intentionally at the time of the original loan.

How this can be business of the same kind, we are unable to fathom.

NO MATERIAL COMPETITION OF WHICH NATIONAL BANKS CAN COMPLAIN.

In a case brought by a national bank, claiming that there was discrimination under Section 5219 of the Revised Statutes in favor of savings banks, because the national bank was taxed on its shares and the savings bank taxed on its capital, the court held that there was no discrimination. The court holds that, while there may not be absolute equality in the taxation of the two kinds of banks, there was not sufficient difference to justify them in saying the tax was invalid. The court says, in that connection:

> "The taxation of shares in incorporated companies which may have something of value by reason of good

will is not, we think, regarded as resulting in inequality of taxation as between shareholders and others owning property similarly employed. Some slight latitude is allowed in modes of assessment demanded by what is deemed controlling considerations, even though they should not result in absolute equality of taxation."

Davenport National Bank v. Board of Equalization, 64 Iowa, 140-3.

In affirming the above case of *Davenport National Bank v. Board*, the Supreme Court of the United States holds that deposits in savings banks are not such moneyed capital as to be in competition with national banks, and says:

"The whole subject has been recently considered by this court in the case of *Mercantile Bank v. New York*, 121 U. S., 138 (30:895). In that opinion it was held that, while the deposits in the savings banks of New York constituted moneyed capital in the hands of individuals, yet it was clear that they were not within the meaning of the Act of Congress in such a sense as to require that because they were exempted from taxation, the shares of stock in national banks must also be exempted. The reason given for this is that the institutions generally established under that name are intended for the deposits of the small savings and accumulations of the industrious and thrifty; that to promote their growth and progress is the obvious interest and manifest policy of the State; and, as was said in *Hepburn v. School Directors*, 90 U. S., 23, Wall. 480 (25:112), it could not have been the intention of Congress to exempt bank shares from taxation because some moneyed capital was exempt."

Davenport National Bank v. Board, Law Ed. 31 U. S. Rept., 94 and 123 U. S., 83.

Georgetown Nat. Bank v. McFarland, 47 (U. S.) Sup. Ct. Rept., 467.

Our Supreme Court, in deciding when it has been shown that there is such competition by other moneyed capital, taxed at 5 mills on the dollar, as to constitute discrimination, has fully discussed the matter in the case of *First Nat.*

Bank Guthrie Center v. Anderson, 196 Iowa 587, from which we have quoted fully under division IV of our argument.

A private bank should not be assessed as "moneyed capital", nor is it discrimination to allow state banks to deduct exempt securities and certain liabilities, while a private bank cannot.

Manning's Bank v. Armstrong, 211 N. W., 485-7.

It is not discrimination against national banks or their stockholders, that private banks may deduct government bonds and stock otherwise assessed, while a national bank cannot.

Head v. Board, 170 Iowa, 300.

Stock in a national bank should not be taxed as moneys and credits. Mortgages held for investment by individuals is not "moneyed capital" in competition with banks.

(Full discussion.)

1st Nat. Bank, Montezuma v. Board, 199 Iowa, 1124-34.

The Iowa Court, in *First National Bank v. Anderson*, 192 N. W., 6, through Judge Arthur states:

"Speaking to this point, the Court, in *Commercial Nat'l Bank v. Chambers*, 182 U. S., 556, said: 'The claim of the benefit of the provisions of Sec. 5219 of the Revised Statutes of the U. S. is unavailing, for the reason that there was neither averment nor proof of facts taking the case out of the operation of the recent decisions of this Court. These decisions held that the term moneyed capital as employed in Sec. 5219, forbidding greater taxation of shareholders of National Banks than is imposed on other moneyed capital, does not include capital which does not come into competition with the business of National banks, and that it must be satisfactorily made to appear by the proof that the moneyed capital claimed to be given an unjust advantage is of the character just stated."

And the Iowa Court, in the cited case, endorsed and applies the rule, and states its conclusions as follows:

> "It was, therefore, incumbent upon it (the bank) to allege the ultimate facts with sufficient fullness to enable the court to ascertain therefrom what, if any, 'other moneyed capital' is loaned in Guthrie Center and vicinity in competition with the normal and ordinary business of appellant and whether the amount is 'relatively material', the demurrer to the petition was properly sustained."

Amount must be relatively material:

The rule is laid down that the moneyed capital which comes into competition with national banks, must come into substantial competition with it, and must, as well, be substantial in amount.

Cases on point:

Merchants National Bank v. Richmond, 256 U. S., 635.
Mercantile National Bank v. N. Y., 121 U. S., 138.
First National Bank v. Chehalis, 166 U. S., 440.

Thus our own State Supreme Court, in several recent decisions, has denied relief becouse the plaintiff bank had failed to prove that a substantial amount of other moneyed capital in competition with national banks was being favorably taxed.

First Nat. Bank of Newton v. Board, 204 N. W., 223.
Jasper Co. Savings Bank v. Board, 202 N. W., 387.
Citizens Nat. Bank v. Treas., 202 N. W., 382.
Montezuma Savings Bank v. Board, 202 N. W., 386.
Poweshiek Co. Savings Bank v. Johnston, 202 N. W., 384.

As the court states, through Justice Faville, in *Montezuma* case, 201 N. W., 769, *supra:*

> "97 assessment rolls were introduced. In 76 of the assessment rolls which were offered in evidence there was no showing whatever as to the character of the money and credits that were assessed, *nor how the same were obtained by the taxpayer.*"

Thus it is clear plaintiff has the burden of proving not only that other moneyed capital, actually in competition with banks is escaping equal taxation with banks, but that the amount is relatively substantial.

Many cases have laid down as the rule expressing the purpose of S. 5219 as follows:

> "The purpose of the restriction is to render it impossible for any state, in taxing the shares, to create and foster an unequal and unfriendly competition with national banks, by favoring shareholders in state banks, or individuals interested in private banking."
>
> *Mercantile Nat. Bonk v. N. Y.*, 121 U. S., 138.
>
> *Des Moines Nat'l Bank v. Fairweather*, 68 L. Ed., 190.
>
> *First National Bank v. Anderson*, 70 L. Ed., 171.

and, hand in hand, with that purpose the cases lay down the additional rule:

> "The term 'other moneyed capital' is intended to include only that capital which is employed in such a way as to bring it into substantial competition with the business of national banks" (cases *supra*).

The Iowa Supreme Court, in *First National Bank v. Anderson*, 192 N. W., 6, expressed the view that the U. S. Supreme Court, in the case of *Merchants Nat'l Bank v. Richmond*, 66 L. Ed., 1135, broadened the rule, and that Congress, in an effort to carry out their intention as expressed in S. 5219, therefore passed the following amendment:

(Act of March 4, 1923, Chap. 267, 42 Stat. at L. 1499 Fed. Stat. Anno. Supp. 1923, p. 84) reading now as follows:

"In the case of a tax on said shares, the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of *individual citizens* of such state coming into competition with the business of national banks; provided, That bonds, notes, or other evidence of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section."

The U. S. Supreme Court, however, in *First National Bank v. Anderson*, 70 L. Ed., 171, takes exception to this opinion in the following language:

"The defendants say that this re-enactment was intended as a legislative interpretation of the prior restriction and that the proceedings resulting in its adoption so show. But, assuming that this is true, the situation is not changed; for the re-enactment did no more than to put into express words that which, according to repeated decisions of this court, was implied before. In *Mercantile Nat. Bank v. New York, supra*, where the terms and purposes of the restriction were much considered, it was distinctly held that the words 'other moneyed capital,' must be taken as impliedly limited to capital employed in substantial competition with the business of national banks. In later cases that definition was accepted and given effect as if written into the restriction. It, of course, would exclude bonds, notes or other evidences of indebtedness when held merely as personal investments by individual citizens not engaged in the banking or investment business, for capital represented by this closs of investments is not employed in substantial competition with the business of national banks. Thus in legal contemplation and practical effect the restriction was the same before the re-enactment as after."

Our own Supreme Court, it appears, has been willing to go further in its holdings. Their attitude on the proposition was stated as follows, in the *Anderson* case, 192 N. W., 6:

> "The Supreme Court of the United States, so far as we are advised, has never had occasion to pass upon the question whether money thus loaned may be said to be invested or loaned in competition with national banks. Upon this question, the decision of the Supreme Court, when announced, will be final; but, until that time arrives, we must adopt and follow our own interpretation of its prior decisions and of the laws of Congress. Surely, moneyed capital loaned and invested by banks, as the agents of their customers, cannot be said to be loaned in competition therewith. Competition means rivalry, and the loaning of money by national and other banks for individuals at a profit, or for the convenience of such owners, is lacking in all the essentials of competition."

Accordingly, they have placed their interpretation on the meaning of the section. In *First National Bank of Montezuma v. Board*, 201 N. W., 769, the court says, through Faville, Justice:

> "As said in *First Nat'l Bank v. Chehalis*, 166 U. S., 440, the main purpose, therefore, of Congress, in fixing limits to state taxation or investments in the shares of national banks, was to render it impossible for the state, in levying such a tax, to create and foster an unequal and unfriendly competition by favoring institutions or individuals carrying on a *similar business and operations and investments of a like character.* (The italics are ours.)
>
> In *First Nat'l Bank v. Chehalis, supra*, the court recognizes the fact that moneyed capital may include shares of stock owned by individuals in all enterprises in which the capital employed in carrying on its business is money where the object of the business is the making of profit by its use as money. The case also

recognizes that the term may include money in the hands of individuals employed in a similar way.

"The case is also authority for the conclusion that money invested in corporations, or in individual enterprises that carry on the business of railroads, of manufacturing enterprises, mining investments and *investments in mortgages*, does not come into competition with the business of national banks, and is not, therefore within the meaning of the Act of Congress."

The Court further states:

"It certainly cannot be said that a land owner in Iowa, who sells his farm representing a part of the purchase price of said real estate, is the owner of moneyed capital in competition with the business of a national bank. Nor can it be contended that a citizen of the state, who deposits money in a bank and receives a time certificate of deposit therefor, bearing interest, is the owner of moneyed capital in competition with a national bank. Nor can it be said that the citizen of this state, who purchases and owns a real estate mortgage as an investment of funds which he may own, by such a transaction becomes the owner of moneyed capital in competition with the business of a national bank; and yet, such securities and evidences of indebtedness are property subject to classification as moneys and credits, and are taxable as such under the laws of this state."

In this case, it was shown that $60,350.00 represented purely investment loans on real estate, and the $26,150.00 loans on chattel security. The court held it to be moneys and credits, and not within the meaning of S. 5219, and adopts as a rule that investments in mortgages do not come into competition with national banks.

Other recent cases hold in accord with the *Montezuma* case.

Poweshiek County Sav. Bank v. Johnston, 202 N. W., 384.

Jasper Co. Bank v. Board, 202 N. W., 387.

Citizens Nat. Bank v. Johnston, 202 N. W., 382.

Under the petitioners' own figures there are only two classes of so-called other moneyed capital that come into competition with the bank stock. These classes are, first, the loan companies which had capital invested in the taxing district, varying from $1,876,000 in 1919, to $6,329,000 in 1922, no showing as to what there was in 1918; second, notes and mortgages in the hands of individual citizens residing in the taxing district.

As we have heretofore pointed out, the plaintiffs' contention, and that which they must prove, to wit, that the taxing and assessing officials were intentionally, systematically and designedly administering the statutes of this state so as to discriminate against the stock of plaintiff banks and in favor of other moneyed capital in the taxing district, cannot be sustained for the reason that the only taxing officials who were authorized to make a classification of property subject to taxation correctly classified the stock of the loan companies in question. This part of the moneyed capital, therefore, must be eliminated from the case insofar as any claim to a systematic and intentional administration of the law discriminating against plaintiffs is concerned, and the only moneyed capital substantial in amount and that it is even claimed is materially in competition is that of the notes and mortgages in the hands of individual citizens. In order that the stock of loan companies or the notes and mortgages in the hands of private individuals can be said to be moneyed capital in competition with bank stock, it must be shown—

(1) That they were moneyed capital within the meaning of Section 5219, R. S. U. S.;

(2) That the capital of each company or individual is substantial in amount as compared with the bank capital, and materially in competition with the banks: In other words, it must be shown that the banks were doing a material part of their business along the lines

in which those claimed to be in competition with them are engaged;

(3) That there is an intentional, systematic plan or conspiracy on the part of the taxing officials to discriminate against the stock of the banks in favor of the other moneyed capital.

In the first place, the capital of any individual loan company, as shown in this record, is not substantial in amount as compared to the capital of the banks, or any one of them. We do not think that it can be contended that all the capital of loan companies in the taxing district can be added together for the purpose of determining whether or not the amount is substantial. If this were true, it might be possible that there would only be one large company with a capital substantial in amount as compared to bank capital and a small company whose capital would not be substantial in amount. The combined capital of these two companies would thus be substantial as compared to bank capital, but the erroneous classification made only of the capital of the large company would not entitle the bank to any relief. This would merely be a sporadic instance of erroneous classification or taxation and not such an act as to entitle the banks to claim that they were discriminated against. If this is true, then each individual company must stand on its own feet and its capital be compared alone with that of bank capital. There is not a company of this nature shown in the record that has capital substantial in amount as compared to bank capital that will bring it within the provisions of Section 5219.

Furthermore, the business of a loan company must be materially in competition with a material part of the bank's business. The fact that banks might occasionally prepare a Will would not warrant the assertion that a material part of their business was the law business. Bank also write insurance but it is not part of the banking business, or even

handle estates in probate as they now do. The banks, as the record shows, are not materially engaged in loaning money in the same manner as the loan companies complained of. Their method and plan of doing business is entirely different and distinct. A reading of any of the citations of the Supreme Court of the United States will substantiate this contention. In other words, as the Supreme Court of the United States in the *First National Bank v. Anderson*, 269 U. S., 341, 70 Law Ed., 295, said in respect to what was other moneyed capital in competition with bank stock, that it must be shown that this moneyed capital is "employed, substantially as in the loan and investment features of banking, in making investments by way of loan, discount or otherwise, in notes, bonds or other securities, with a view to sale or repayment and reinvestment."

Plaintiffs single out the different features named in this quotation and say "notes", "bonds" and "securities" are in competition with bank capital, while as a matter of fact these investments are not in competition with bank capital unless they are made "substantially as in the loan and investment features of banking". The records show that these investments are not made as in the loan and investment features of banking, but are made in an entirely different manner. In fact, the loans are made in such a way that in most instances the banks would not handle them at all, so it cannot be said that the capital of the loan companies is materially in competition with the business of banks.

It also must be shown that the assessorial bodies *properly charged with and having authority* to make a classification of property, intentionally and systematically carried on a plan or conspiracy to discriminate against bank capital in respect to loan companies. The evidence fails entirely to substantiate this allegation, but on the contrary shows that the bodies properly charged with the classification of property for taxation purposes correctly classified the capi-

tal of loan companies in the manner contended for by the plaintiffs. The county auditor and board of supervisors have nothing whatever to do with the classification of property and, as our court has said in the case heretofore cited, the action of a county auditor in changing a classification is illegal and void.

(*Fort Madison Security Company v. Maxwell, supra.*)

Turning to the notes and mortgages in the hands of individual citizens, we cannot concede that these investments meet any of the requirements necessary to bring them within the provisions of Section 5219 and thus taxable as moneyed capital in competition with banks. A reading of the cases most relied upon by appellant—that is the two recent decisions of the Supreme Court of the United States, in *First National Bank of Hartford v. Hartford*, 71 Law Ed., 767, and *State of Minnesota v. First National Bank of St. Paul*, 71 Law Ed., 744, will fail to show that the decisions supported plaintiffs' contention as to this class of property. In the *Hartford* case the Supreme Court speaks at all times about the capital employed in the *business* of those alleged to be in competition with the banks. Furthermore, the evidence was not contradicted and the court in the cited case, as well as in the other decisions upon which plaintiffs must rely, complains of this fact. In the *Hartford* case the Court said:

> "The evidence might have been directed more in detail to the precise character of the competition. But that offered was uncontradicted, and when it was shown that national banks in the State of Wisconsin having a capital and surplus in excess of fifty millions of dollars are engaged in the business of making loans, and that there is *an extensive loan business* in the state not subjected to the tax burdens of national banks, and it was testified directly that *this business* came into competi-

tion with the business of plaintiff and other national banks, we think that the finding of the trial court was supported by the evidence and should not have been disturbed."

It was testified directly in the case at bar that loan companies and individuals were not in competition with the banks. It was upon this basis that the *Hartford* case was decided and it only refers to the *"business"* of making loans and other investments that come into competition with banks. The individuals shown in the record in the case at bar are not engaged in the *"business"* of making loans on any kind of securities in which the banks deal. The *business* of all of these individuals was something entirely different and distinct from the loan and investment business as featured by banks. In fact there were lawyers, doctors, farmers, drygoods and clothing merchants, retired business men, women, guardians, trustees and other individuals before the Court, but *none of them were engaged in the business of making loans and investments.* This is the same theory upon which the case of *Minnesota v. First National Bank, supra,* was decided. Our contention is clearly supported by the decision of the Supreme Court in *Georgetown National Bank v. McFarland,* decided at the same time as the *Hartford* and *Minnesota* cases, reported in 71 Law Ed., 779, for in the last cited case the Court said:

"Plaintiff in Error, seeking to establish that the favored capital was in competition with national banks, relied principally upon the proof that there were substantial amounts of capital invested in the state by individuals in bonds, notes, accounts and mortgages, aggregating approximately $1,500,000, which it is contended represents moneyed capital in competition with national banks. *But the plaintiff made no attempt to show that there were other businesses or courses* of investment in the state employing moneyed capital in competition with its business or that of other national

banks. The evidence with respect to capital invested by individuals, taken as a whole, falls short of establishing that the capital thus used is employed substantially as in the loan and investment features of banking, in making investments by way of loan or discount or in notes, bonds and other securities, with a view to sale or repayment and reinvestment."

We believe that the Supreme Court of the United States in all of its decisions has established the rule that there must be a competitive *business* with national banks, either carried on by individuals or corporations, and that the capital used in this *business* must be employed substantially as in the loan and investment features of the banking business by way of loan or discount or in notes and other securities with a view to sale and repayment or reinvestment. We do not believe that it can be contended and certainly there is no express language in any of the decisions of the United States Supreme Court holding that investments of individuals in a note and mortgage held for the purpose solely of the individual's profit by obtaining the interest thereon until the note is paid, is in any way employed as in the loan and investment features of banking. To be so employed, the notes must be purchased with a view to sale or re-discount and reinvestment. Not an individual shown in this record is so engaged. It was also said by the Supreme Court of the United States in *First National Bank v. Anderson, supra,* page 304, in regard to whether notes and mortgages in the hands of individuals was moneyed capital within the meaning of Section 5219:

"It, of course, would exclude bonds, notes or other evidences of indebtedness *when held merely as personal investments by individual citizens not engaged in the banking or investment business,* for capital represented by this class of investments is not employed in substantial competition with the business of national banks."

The cited case also quoted from the decision in *Merchants National Bank v. New York*, 121 U. S., 138, 30 Law Ed., 895, which case was most strongly relied upon by us in the *Anderson* appeal.

In addition to the decisions of the Supreme Court of the United States, which we believe when properly interpreted hold that notes and mortgages in the hands of individuals, unless engaged as a business in some feature of the banking business, are not moneyed capital within the meaning of Section 5219, there are a number of recent decisions of the Supreme Court of this state holding squarely that securities of this nature are not moneyed capital within the meaning of said section. We refer especially to the decision of our court in *First National Bank of Montezuma v. Board of Review*, 199 Iowa, 1124, wherein a full discussion of this question is had and a complete analysis made of the decisions of the Supreme Court of the United States bearing upon this question. The only class of property which it was contended was in competition with bank capital in the cited case was notes and mortgages in the hands of individuals. See also *First Nat. Bank of Newton v. Board*, 200 Iowa, 131. There was no evidence or testimony of any loan companies or any business coming into competition with banks. The District Court held that notes and mortgages in the hands of individual citizens, such as are shown in the record in the case at bar, were moneyed capital within the meaning of Section 5219. The Supreme Court, however, in the cited case, at page 1135, said:

> "We reach the conclusion that, upon the record in this case, the trial court was in error in holding that there was moneyed capital within the taxing district which was taxed in any different manner than the shares of appellee bank were taxed."

See also *First National Bank of Newton v. Board*, 204 N. W., 223.

The petitioner has introduced evidence of transactions of various U. S. Land Banks as being in competition with National Banks. It would seem that if the National Banks were already performing the duties of the Land Banks there would have been no need to provide for such banks. Evidently Congress did not consider that the Land Banks would in any way compete with or cause it competition with the National Banks.

We are confident, therefore, that notes and mortgages in the hands of individual citizens fail to meet any of the three requirements necessary in order to entitle plaintiff to relief. Apparently plaintiff has largely abandoned any contention in respect to notes and mortgages in the hands of individuals and relies almost entirely, if not exclusively, upon the illegal classification of loan companies by the county auditor and, as we have pointed out, and the Iowa Supreme Court has held, this illegal act cannot avail petitioner in an action to recover taxes properly paid.

In conclusion we would again draw the court's attention to the rule that has been laid down by it that it is only when the moneyed capital in the hands of competitors draws business away from the banks and when thereby "the business of the national banks would be curtailed", (*Mercantile National Bank v. New York, supra*) that competition arises within the meaning of Section 5219. Applying this rule to the actual situation as disclosed in the evidence of the banks in this case it appears that not only the Iowa National Bank and the Central State Bank but also the Valley National Bank and the other banks as to which evidence was taken were doing all of the business that they cared to do or wanted to do along the lines as to which they are complaining there is competition. They admit that they all got all the real estate loans they wanted, all the automobile loans they wanted, all the cattle paper they could carry or cared about, and also all the small loans, and the evidence further shows

that during this period they were making profits which were unsurpassed in their history, which profits were reflected either in dividends or in increased surplus. It is, therefore, clearly apparent that even if there was a technical violation of Section 5219 on account of the illegal act of the Auditor, the banks, both national and state, did not in any way suffer therefrom. Certainly the claim that they might have suffered under some circumstances would not be sufficient justification for letting them escape their fair share of the taxes on account of an illegal act of one of the taxing officials.

Petitioner is not claiming any title, right, privilege or immunity within the meaning of Judicial Code Section 237. There can be no right, privilege or immunity, to be taxed improperly and contrary to law and in a less amount than the law provides, because some one else is improperly and contrary to law taxed in a less amount than he should be on account of the illegal and improper acts of a ministerial official, such as the county auditor in this case. Petitioner is not claiming that the provisions of the law as to its taxation have not been properly carrried out, it admits that they have. What it is claiming is that because certain other persons, who it claims were in competition with it, were allowed by the illegal acts of the county auditor to be taxed at a less rate than the law required, then petitioner should also be allowed to escape a part of its taxes, contrary to law. Thus adding to the wrong already committed against the taxpayers who have been legally taxed and who must make up and pay the taxes escaped by the petitioner and other persons illegally taxed in too small an amount. Certainly no privilege or immunity, under the Constitution of the United States could arise under this state of facts. The Constitution is a shield, and was not adopted for the purpose of perpetuating and increasing a wrong already committed, or to put peo-

ple on an equal basis by allowing them all to commit the same wrongs. The following case supports this proposition:

State v. Hall, 54 Southern 560.

In that case the Supreme Court of Alabama had before it a question of assessment for taxes in which the complainant alleged that her assessment was illegal because while complainant's property was valued at, or near its full value for assessment purposes there was property of other people that had been assessed on the basis of only 60% of its value. The 60% valuation, however, was contrary to the law of the State which provided that property should be assessed at its full value. The Court in holding that under such circumstances the complainant could not appeal to the equal protection clause of the Constitution used language that seems so appropriate in the instant case that we cannot refrain from quoting same as follows:

> "Further comment would seem to be unnecessary. In the present case there has been no discrimination against the appellee by the laws of the state, nor by any of its constituted authorities. It is doubtless true that some of its officers are not enforcing the provisions of its tax laws looking to the assessment of all property at its true value. But the laws forbid discriminaton; nor is there lodged in any tax officer or board, nor even in any court, an unrevisable discretion, nor any discretion at all, as to the mode and basis of assessments. The 'equal protection of the law' cannot mean equal immunity in its violation or evasion. If the police officers of a city should by concerted agreement, but in flagrant dereliction of duty, enforce the prohibition laws only against certain ones among those engaged in their violation, this does not beget a constitutional right in favor of one thus discriminated against, to operate a blind tiger. To so interpret the fourteenth amendment would be to make of it a Tarpeian rock, upon which may be flung to their death the domestic laws of every state. A condition of maladministration being once established through the

infidelity of public servants, reform might become impossible, since every lawbreaker may have acquired by virtue of the protection of the fourteenth amendment the right to pursue his nefarious course unmolested, so long as others are not disturbed. We are aware that we are stating an extreme case, but it comes fairly within the scope of the argument, and legitimately illustrates the vice of appellee's contention. We are clear in the conclusion that the appellee cannot invoke the fourteenth amendment as a means of evading the rule established by the statutes of this state for the assessment of her property for taxation."

PROPOSITION IV.

It is to be borne in mind in this case that there is no claim that the law in Iowa in and of itself creates any discrimination as against a national bank. The only claim is that the manner in which the law was administered by the taxing officials created such discrimination. Some of the cases seem inclined to lay down the rule that where the complaint of discrimination is based not on the state law itself but on the manner of its administration by the taxing officials, that it is then not sufficient for a complaining bank to show that there was moneyed capital that might be in competition with national banks assessed at a lower rate than the national banks, but the complaining bank must go further and show that there was moneyed capital being assessed at a lower rate which was actually in competition with the individual bank complaining. The reason for this distinction is sound. The discrimination created by law would apply as to all banks and would be presumed to be detrimental to them. A discrimination, however, caused solely by the acts of the taxing officers, whether legal or illegal, can only be complained of if the bank is damaged thereby. No person can complain in a court of law of the infringement of his rights unless he can show some damage and therefore it is essential in that

class of cases to show that the complaining bank has been damaged, or, in other words, that its actual competitors and not its possible competitors have been favored by a lower rate of taxation. This rule, in effect, has been announced by the Iowa Supreme Court in the case of

First Nat'l Bank of Guthrie Center v. Anderson, 196 Iowa 587.

In that case the Court in holding that no showing was made that moneyed capital in competition with the bank had been favored or taxed at a lower rate says:

> "Although it does not appear upon the face of the petition, it is a matter of common knowledge that banks, national as well as state, particularly in the rural communities of Iowa, are the instrumentalities through which much the larger portion of farm loans is made; that many banks, as such, or through others with which they are interested, act as agents of insurance companies and other financial institutions having large sums of money to loan upon farm security; and that the money of individuals is either loaned directly by the bank for the accommodation of the owner, who is its customer, or loans are made in advance by the bank, and later transferred to such other customers as have money to loan. The money of individuals loaned in the community thereby becomes a source of profit to the bank. It is also well known that money borrowed upon farm security finds its way at once, or ultimately, into the local banks, and is drawn out in the regular course of the borrower's business.
>
> "The Supreme Court of the United States, so far as we are advised, has never had occasion to pass upon the question whether money thus loaned may be said to be invested or loaned in competition with national banks. Upon this question, the decision of the Supreme Court, when announced, will be final; but, until that time arrives, we must adopt and follow our own interpretation of its prior decisions and of the laws of Congress. Surely, moneyed capital loaned and invested by banks, as the agents of their customers, cannot be said to be loaned in competition therewith. Competition means rivalry, and

the loaning of money by national and other banks for individuals at a profit, or for the convenience of such owners, is lacking in all the essentials of competition. The petition does not charge that the appellant bank is engaged in loaning its funds upon real estate security. Under the laws of Congress, it could not loan sums in excess of 25 per cent of its capital and surplus, or one-third of its time deposits. The amount of its time de-deposits is not alleged, but the net actual value of its capital, surplus, and undivided earnings is shown to be $91,507.83. It seems to us that the allegations of the petition are wholly insufficient to be made the basis of a holding that the tax in controversy is void because of the large amount of moneyed capital loaned upon farm security in Guthrie County by residents thereof. What amount, if any, of the money thus invested is loaned in competition with appellant is not alleged. We cannot infer from the facts admitted by the demurrer that the moneyed capital referred to is invested in competition with appellant. The burden of showing this fact rested upon appellant. *Merchants' Nat. Bank v. City of Richmond, supra; Boyer v. Boyer,* 113 U. S. 689.

"It was, therefore, incumbent upon it to allege the ultimate facts with sufficient fullness to enable the court to ascertain therefrom what, if any, 'other moneyed capital' is loaned in Guthrie Center and vicinity in competition with the normal and ordinary business of appellant, and whether the amount is 'relatively material'."

PROPOSITION V.

It is to be noted that the provision of Section 5219 of the U. S. Code is that the discrimination forbidden as to taxes as to "moneyed capital in the hands of *individual citizens*". Clearly here the intention was to refer only to money in the hands of natural persons who were citizens of the state, otherwise there is no particular use of using the word individual. It might all have been covered by the word citizen as a corporation can be a citizen of a state but a corporation has never been held to be an *individual* citizen. It was

squarely held by the Court of Appeals of Texas that the phrase "moneyed capital in the hands of individual citizens" referred only to moneyed capital owned by natural persons and not to such capital as belongs to corporations, and this opinion was based on various decisions of the United States Supreme Court. See

Prim v. Fort, 57 S. W. 972.

The United States Supreme Court cases, however, referred to therein as to authority for their finding are set out in a former decision of the same case, to wit:

Prim v. Fort, 57 S. W. 86.

The United States Supreme Court decisions there cited supporting their finding are

First Nat'l Bank of Aberdeen v. Chehalis Co., 166 U. S. 440.

Bank v. Chapman, 173 U. S. 205.

Mercantile Bank v. City of New York, 121 U. S. 138.

In the case of

Perkins v. Smith, 23 N. E. 21-3

the New York court of appeals held that the term "individual banker" was not the same as the term "private banker", as the private banker might include either a person or a corporation, while an individual banker would only denote a person. To the same effect see

People v. Doty, 80 N. Y. 225-8.

Under no other construction can meaning be given to both the words used, individual and citizens. If we are correct in this contention this would take out of consideration all of the corporations as to which the Auditor made the change in the rate of taxation and would leave only the assessments of the various individuals and as to them the Supreme Court of Iowa has held that the remedy as to any error in those assessments was by objection before the Board of Review and appeal to the District Court therefrom, and therefore the

petitioner having mistaken its remedy as to these assessments cannot now be heard in this court.

PROPOSITION VII.

Petitioner, Central State Bank is a state bank, organized under and subject to the laws of the State of Iowa, it therefore cannot claim any rights or privileges under Section 5219 of the Revised Statutes of the United States which applies only to National Banks. Petitioner has no rights here unless it can claim some violation of the 14th Amendment to the United States constitution. Petitioner is however a creature of the state and subject to its laws. It may be deprived of its entire existence by the State that created it, and its rights may be limited and abridged by the state at any time. Even if what the auditor did as complained in this case, in assessing individuals in competition with petitioner at a lower rate, was the law of the state and had been done pursuant thereto, there would be no violation of the constitution as to petitioner, because different classes of people can be taxed at different rates if there is a reasonable classification. The state in creating a bank may provide that if it decides to accept a charter and become a bank, as a condition thereto it shall be taxed at a certain rate, different from other persons or corporations and there would of course be no violation of the constitution. Petitioner as a state bank therefore has nothing to complain of.

The following cases support this proposition:

Layman v. Telephone Co., 123 Iowa 591-600.
Primghar State Bank v. Rerick, 96 Iowa 238-42-4.
Bells Gap Ry. v. Commonwealth, 134 U. S. 232.
Pac. Ex. Co. v. Seibert, 142 U. S. 339.
Giozza v. Tierman, 148 U. S. 567.

The Constitution of Iowa, Sec. 12 of Article VIII, is as follows:

> "Amendment or repeal of charters; exclusive privileges. Sec. 12. Subject to the provisions of this article, the general assembly shall have the power to amend or repeal all laws for the organization or creation of corporations, or granting of special or exclusive privileges or immunities, by a vote of two-thirds of each branch of the general assembly; and no exclusive privileges, except as in this article provided, shall ever be granted."

The provisions of the Code of Iowa of 1927 on this matter are as follows:

> "8376. Legislative control. The articles of incorporation, by-laws, rules and regulations of corporations hereafter organized under the provisions of this title, or whose organization may be adopted or amended hereunder, shall at all times be subject to legislative control, and may be at any time altered, abridged or set aside by law, and every franchise obtained, used, or enjoyed by such corporation may be regulated, withheld, or be subject to conditions imposed upon the enjoyment thereof, whenever the general assembly shall deem necessary for the public good."

The Iowa Supreme Court says:

> "That it is competent for the Legislature to adopt different methods for ascertaining the value of personal property, and to fix the situs of such property, is well settled. Therefore, it may provide for the taxation of corporations as provided in Section 1323 of the Code and fix the place for the assessment."
>
> *Layman v. Telephone Company*, 123 Iowa, 591-600.

In a case brought by an express company, claiming that the law, providing that the property of express companies should be assessed in the city where such company had an

office for the transaction of its business, was unconstitutional, because the property was not subject to taxation the same as that of individuals, the court held that the law was not unconstitutional and that it was not a special law. The court, in connection with the discussion of the question whether this was a special law and, therefore, unconstitutional, says, as follows:

> "Now, it would seem to necessarily follow, that if the act in question is a special law, for the reason that it prescribes a fixed and specific rule for the assessment of the property of express and telegraph companies, then Section 723 of the Revision which prescribes a fixed and specific rule for the assessment of the property of merchants, and Section 724, which prescribes another fixed and specific rule for the assessment of the property of manufacturers, must also be held to be special laws, and consequently, within the prohibition of the clause of our State Constitution relied upon by appellant's counsel, and quoted above. But these sections are not, and have never been claimed to be, in any sense whatever, special laws. Neither is that act a special law."

The court, in this connection, points out that the provisions of our Iowa Constitution differ from those of some other States where different rulings had been made by the courts, and especially points out that we have no constitutional provision that "the rule of taxation shall be uniform." Nor do we have a provision as in California that "taxation shall be equal and uniform throughout the State." The court, in this case, also cites the many differences in the methods of assessment of taxes against different classes of corporations and individuals which are not a violation of our constitutional provision. The court also incidentally points out in this case that double taxation is not unconstitutional.

United States Express Company v. Ellyson, 28 Iowa, 370-7.

The rule is well settled that the XIVth Amendment cannot be invoked here. The opinion of the U. S. Supreme Court is stated in *Bells' Gap Railroad v. Commonwealth of Penn.*, 134 U. S., 232. The Court, through Justice Bradley, on page 895 of Lawyers' Edition, Volume 35, says, in this case:

> "The provisions in the XIVth Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulation, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State Legislature, or the people of the State in framing their Constitution. But clear and hostile discrimination against particular persons and classes, especially such as are of an unusual character, might be obnoxious to the constitutional prohibition."

The following are a few of the many decisions holding that the XIVth Amendment does not limit the taxing power of the State by imposing on it any rule of equality, so long as its classification is not wholly arbitrary.

Chester v. Penn., 134 U. S., 240 (33 L. E., 896).
Home Ins. Co. v. N. Y., 134 U. S., 594 (33 L. E., 1025).
Pac. Exp. Co. v. Sichert, 142 U. S., 339 (33 L. E., 1035).
Charlotte C. & A. Ry. Co. v. Gibbs, 142 U. S., 386 (33 L. E., 1051).
Jennings v. Coal Ridge Imp. & C. Co., 147 U. S., 147 (33 L. E., 117).
Giozza v. Tiernam, 148 U. S., 567 (33 L. E., 599).

In the case of *Insurance Ass'n. v. Gilbertson*, 129 Iowa, 658, the Supreme Court of Iowa says:

> "This rule, however, does not prevent the Legislature from selecting certain classes of persons, occupations or property for taxation according to its discretion, provided that its classification is not wholly arbitrary and unreasonable."

Thus it is seen that the burden is on plaintiff to show that our statutes or the deliberate and intentional acts of the taxing officers complained of discriminate between persons and property of the same class.

See also

Missouri v. Dockery, 191 U. S., 165-70.

It is true that the cases we have cited refer primarily to laws passed by the State, as distinguished from their administration, but the same principle would apply, if as claimed by the petitioner, the county auditor or the assessor and board of review had lawful authority to make the assessments complained of, against the competing corporations and individuals on the basis of moneys and credits. Their acts being as claimed legal and pursuant to authority granted to them by the statutes, would under such circumstances be the acts of the State just as much as a statute passed by the legislature. If therefore as stated in the cases above, the State can by direct statute assess different classes of taxpayers in different manners, without violating the constitution, it could indirectly through its proper officers decide which particular class should be taxed in one manner and which in another, without violating the constitution either state or national. And this reasoning would apply equally to a national bank, so far as its claims that the constitutions of both Iowa and the United States have been violated are concerned. It is admitted that all classes of banks, Na-

tional, State and Savings are assessed and taxed on the same basis. There is absolutely no showing that the corporations and individuals whose assessments are complained of were so similar to banks that to put them in another class for purposes of taxation would be a purely arbitrary classification. In the absence of such a showing the petitioner State bank cannot claim a violation of the constitution.

PROPOSITION VIII.

In no event could the erroneous or even the illegal individual acts of one or more taxing officials become a violation of the constitution so that it could be reviewed and relief obtained by appeal or certiorari. The County Auditor could have corrected the error he made but the petitioner never asked him so to do. The Code of Iowa, 1927, Section 7149, provides as follows as to the power of the Auditor:

> "Section 7149. Corrections by auditor. The auditor may correct any error in the assessment or tax list, and may assess and list for taxation any omitted property."

and this has been the law of the State during all of the period covered by this suit, and that is all the power that he has.

The Supreme Court of Iowa in the suit of

Ft. Madison Security Co. v. Maxwell, 202 Iowa, 1346

has held that the Auditor has nothing to do with deciding whether certain securities shall be assessed as moneys and credits or as moneyed capital. The Court in so deciding says:

> "Under these provisions of the statutes, in force at the time of the assessments in question, it was clearly the duty and function of the assessor, in the first instance, and of the board of review, to determine whether given money and securities belonging to a corporation other

than a bank or trust company were to be listed and assessed as moneyed capital, under the provisions of Section 1310, or were to be considered in determining the value of the shares of stock to be assessed to the shareholders, as provided by Section 1323. * * *

"Even where, as would appear to be the case in the assessments in question, and as is now required by Section 7008, Code of 1924, the value of moneys and credits belonging to such a corporation is assessed to the corporation, the question of whether given property is to be assessed as moneys and credits or moneyed capital is to be determined by the assessor, subject to review and correction by the board of review. * * *

"We think it clear that the auditor did not have power, under Section 1385-b, to change the classification and assessment of appellant's property from moneys and credits to moneyed capital."

The Supreme Court of Iowa has held in the case of

First Nat'l. Bank of Burlington v. Webber, 196 Iowa, 1155

that the County Auditor had no authority to correct the records as to the assessment against a bank so as to change the assessment made by the assessor and the board of review, and that where he had done so his act was such an illegality that it could be corrected by certiorari to the District Court.

The Supreme Court of Iowa has held in the case of

Ridley v. Gauty, 85 Iowa 418

that the auditor could be compelled by mandamus to make corrections in the tax list.

The Supreme Court of the United States has held that the unauthorized act of an official, especially where it is expressly contrary to law, and where it could have been corrected by proper application to the state courts, which was not done, does not raise a constitutional question or a federal question under the constitution. See

Barney v. City of New York, 193 U. S. 430-8.

In that case this Court says:

"Controversies over violations of the laws of New York are controversies to be dealt with by the courts of the state. Complainant's grievance was that the law of the State had been broken, and not a grievance inflicted by action of the legislative or executive or judicial department of the State; and the principle is that it is for the state courts to remedy acts of state officers done without the authority of or contrary to state law."

The plaintiffs have reiterated, both in their pleadings and in their objections, and in their questions and in their arguments, that "The taxing officers of Polk County, State of Iowa, did, in each of said years, habitually, wilfully, intentionally, systematically and generally" assess their competitors in the alleged improper manner complained of. Why do they keep repeating this sentence in this identical form? The reason is that it is the mystic shibboleth which the United States courts have fixed upon, in order to be able to say that the *administration* of the law, as distinguished from *the law itself*, is in contravention of the provisions of Section 5219 of the Statutes of the United States. This shibboleth is equivalent to the courts saying that there must be conspiracy and collusion among the taxing officials to accomplish the thing complained of. It presupposes an admission that the act of one taxing officer alone, or the sporadic acts of several taxing officers combined together, would not be sufficient, even in the view of the Federal courts, to constitute a violation of Section 5219. Of course, as to the state courts, this shibboleth does not apply at all. That is not the test in the state courts as to whether the action of officials, if it ever can be unconstitutional, is unconstitutional or raises a constitutional question. This is strictly a catch word or phrase of the Federal courts as bearing upon competition of national banks, and, of course, it is not a test of constitutionality at all. It is merely a test of whether the administration of the law, as distinguished from the law itself,

is in conflict with Section 5219. We do not have to worry then with this phrase with regard to the state banks. Taking up the national banks, however, let us see whether, in this case, they have brought themselves even within their own definition. The only assessments as to which all of the taxing officers apparently agreed was the assessment as against moneys and credits in the hands of individuals. The Assessor and the Board of Review classified them as moneys and credits and the Auditor transferred them to the tax list of Polk County as moneys and credits and they were taxed on the five mills basis. There was no collusion or conspiracy about it. These officers just figured that that was what the law said to do and they did it. However, the individual taxpayers no longer cut very much figure in this suit. As we understand the plaintiffs, at least in their oral argument in the District Court, they have practically abandoned their position that the taxation against these individuals would, either in amount or for any other reason, raise the question of material competition with the national banks, and the Supreme Court of Iowa has held that their remedy as to these was by appeal, so there is no need to discuss that further. As to the corporations, however, claimed to have been in competition with banks, there was no agreement among the tax authorities. The Assessors and the Board of Review taxed them all as corporation stock which would have resulted in taxation at a higher rate than the moneyed capital rate. The auditor changed these from corporation stock to moneys and credits. Certainly, this would not indicate anything, either habitual, intentional, systematical, or general, on the part of the taxing authorities, as they seem to have been divided among themselves as to what should be done. The major portion of them wanting to do it in the manner in which the plaintiffs claim was correct, and one individual only, without any apparent authority of law, desiring to do

it the other way. This would seem to us to fall far short of such an administration of the law, which, even under the plaintiff's own definition, would come in conflict with Section 5219.

In addition to this, the Auditor testified that, in making the changes and classification, he acted in good faith and in the belief that he was assessing these corporations as they should be assessed under the law. This would show that there was no habitual, wilful, intentional, systematical or general attempt, on his part, to violate the law, or to create improper discrimination as against the plaintiff national banks.

It is clear, therefore, under the above authorities that there was no violation of the Constitution or of Section 5219 on account of the illegal acts of the Auditor in changing the assessment of the corporations. The assessment of the individuals is no longer in question here as the Supreme Court of Iowa in its opinion in this case has held that the remedy of the petitioner in such a case was by appeal from the board of review and that being a question of remedy or State practice the United States court will not interfere with the decision of the Supreme Court of Iowa on that point.

PROPOSITIONS IX AND XI.

Adjudication, Laches and Estoppel.

The doctrine of *res adjudicata* applies as well to tax proceedings as to ordinary litigation between individuals.

Blondel v. Woodbury Co., 212 N. W., 335.

Beginning on page 148 of Appellees' Denial of Abstract and continuing to page 271 of the same being pages 1214 to 1316 of the printed record in this court are set out the pleadings that were offered as evidence in various prior

cases brought in the State Courts by the appellant banks and which we claim constituted an adjudication. In addition to these the petitioners, Iowa National Bank and the Central State Bank brought injunction suits in Federal Court to prevent the collection of these very taxes and raised all the questions raised here and later dismissed the suits. See Appellants' abstract, page 695, being page 825 of printed record here.

The first case is *Iowa National Bank v. Barton, Mayor,* set out on page 166 of denial of abstract being page 1228 of the printed record in this case. This was an appeal from the Board of Review on account of assessment made as of January 1, 1920. The objections raised in this case were not only that they did not deduct United States Bonds and stock in the Federal Reserve Bank, but also raised the very question raised here, that stock of the National Bank was assessed at a greater rate than assessed upon other money capital in the hand of individuals within the state. In this case a stipulation was entered that it was to follow the case of the *Des Moines National Bank v. Fairweather,* then pending in the Supreme Court of Iowa and pursuant to that stipulation the case was dismissed. As this case was decided it was a complete adjudication of the questions raised in the present suits in that the same questions were raised and the case in accordance with the stipulation was decided against the bank and dismissed with prejudice.

The next case is *Central State Bank v. Barton,* beginning on page 179 of Appellees' Denial of Abstract being page 1237 of the printed record in this case. This case also involved the assessment as of January 1, 1920. This was also an appeal from the Board of Review and the only objection made was that there had not been deducted certain Liberty Bonds and stock in the Federal Reserve Bank. This case was governed by the same stipulation that it should follow the *Des Moines National Bank v. Fairweather* and pursuant to

that stipulation it was decided against the Central State Bank and the cause dismissed. Here again is an adjudication not only of the questions they did raise, but the questions they might have raised, including those they have raised in the present suits.

The next suit is found on page 223 of amended abstract being page 1270 of the printed record here, and was brought by the *Iowa National Bank v. Barton, Mayor*, and was an appeal from the action of the Board of Review with regard to the assessment made as of January 1, 1921. On this appeal they not only raised the question that the Board should have deducted certain Liberty Bonds from the bank's assessment, but further on page 227 being page 1279 of printed record, they raised the question that the assessment was erroneous and contrary to United States Statutes because there was moneyed capital in the hands of individuals in competition that was taxed at a lower rate. In this suit all of the questions raised in the present suit were pleaded and under a stipulation that the case was to follow the result in the case of *Des Moines National Bank v. Fairweather*. On the decision of the latter case the Iowa National Bank case was dismissed. This was a complete adjudication of all the questions raised in the present suits because the identical questions were raised in that suit and were decided against the Iowa National Bank.

The next suit is found on page 245 of Appellees' Denial of Abstract being page 1287 of the printed record here and is brought by the *Central State Bank v. Barton, Mayor*, and is an appeal from the Board of Review on account of its refusal to deduct from the assessment made of January 1, 1921, certain Liberty Bonds and War Savings Stamps and Stock in the Federal Reserve Bank owned by the bank. This suit also followed the case of *Des Moines National Bank v. Fairweather* and after the decision of t[illegible]ase was dismissed and constituted an adjudication a[illegible] the Central

State Bank on all of the questions that might have been raised on the assessment as of January 1, 1921.

In addition to these suits the Iowa National Bank, now the Iowa-Des Moines National Bank, and the Central State Bank each brought a suit in the United States District Court for the Southern District of Iowa asking an injunction against Allen Munn as County Treasurer of Polk County, Iowa, to prevent him from collecting the identical taxes which they are now seeking in this proceeding to recover. These suits were brought at the same time as the suits of the Des Moines National Bank against Allen Munn, County Treasurer, and the petition filed and questions raised by Iowa National Bank and Central State Bank were identical with those raised by the Des Moines National Bank in this *Munn* suit, which was later carried to the Circuit Court of Appeals and decided against the Treasurer, being the case that is claimed by the petitioner in this case to be an adjudication as against the respondents. For some reason, however, the Iowa National Bank and the Central State Bank neither one of them prosecuted its suit to a conclusion but voluntarily dismissed the same. If this does not constitute an adjudication it certainly would constitute estoppel and laches on the part of these peitioners. The respondents surely had a right to assume, when suits were commenced raising these very questions and were later dismissed after the respondents or those who represented them had gone to the expense of procuring counsel and preparing to defend the same, that the petitioners had abandoned their claims as to illegality of the taxes and had acquiesced in the action of the respondents and were going to pay the taxes. And as a matter of fact the record shows that they did later pay these identical taxes, in some cases with protest and in some cases without. The record showing that the respondents have gone ahead and disbursed the taxes to the various spending bodies, relying, or certainly with the right to rely, on the acquiescence of these petitioners and the

dismissal or adjudication against them of the various suits they brought, it would not now be fair and equitable to require the respondents to collect back from the various taxing bodies this very money which has been disbursed as above outlined.

In this connection and as bearing on this question of estoppel and laches we would also call the Court's attention to the fact that all, or practically all, of the assessment rolls of the petitioners that were introduced had written upon them a statement signed by an authorized officer of the bank in the following form or in equivalent form: "Iowa National Bank agrees to pay the taxes justly and legally due on the assessment made to the stockholders of this company for the year 1920." See Appellant's abstract, page 658, now Page 787, l. 34 of the printed record here. It is to be noted too in connection with this agreement to pay there was no statement or claim made in any case as to any objections that was being made by the bank to the assessment.

We contend, therefore, that these suits or appeals constituted adjudications against the banks with regard to the taxes involved in each case the same being most of the taxes involved in these cases. With regard to the two or three cases that were dismissed without prejudice, if they were not an absolute adjudication they certainly created an estoppel which would prevent the banks in this late day from claiming they had objections other than they raised on these appeals. This is especially true in view of the fact that the officers of Polk County and the other taxing bodes had a right to assume, and did assume that these were all of the questions that the banks had in mind. This particular question especially of deduction of Liberty Bonds having been decided against them in the case of *Des Moines National Bank vs. Fairweather* and all of these cases being dismissed and the taxes paid, the taxing officers had a right to assume that this was a closed incident and they could distribute the money

and act on the assumption that the taxes were properly levied and did not have to be refunded; and they expended the money on that basis and in that belief.

The following cases support our contention.

Where a person voluntarily listed his property in a certain county and voluntarily paid the tax and the taxing body incurred debts, made estimates and paid out money relying on the assessment the taxpayer is estopped to recover it back. The payment of taxes under mistake of law will not entitle recovery under Iowa statutes. This was held in the case of

Slimmer v. Chickasaw Co., 140 Iowa 448-53.

The following cases support the proposition that a former judgment is a bar or estoppel against a prosecution on the same claim or demand between the same parties and concludes them not only as to what was offered to maintain or defeat the claim but as to any other admissible matter that might have been offered.

Pierce v. National Bank of Commerce, 268 Federal 487.
Taylor v. Taylor, 240 S. W. 6.
Cressler v. Brown, 192 Pac. 417.
Reinkey v. Wilkins, 179 N. W. 751.

In the case of

Elder v. Fink, 180 N. W. 542

the Supreme Court of Minnesota held that a final judgment in a former action between the same parties is conclusive as to every matter which might have been properly litigated in that action and is a bar to a subsequent action although in form and remedies sought the two actions are different.

In the case of

Village of Winnetka v. Handy, 128 N. E. 805

the Supreme Court of Illinois held in a tax assessment case that in proceedings for confirmation of a supplemental as-

sessment for local improvements objections to the validity of the original assessment could not be raised since the judgments confirming original assessments were conclusive as to everything that was or could have been raised at that hearing.

The Supreme Court of Iowa has held in the case of

Farmers Insurance Co. v. Linn County, 202 Iowa 444

that where a person who is the chief stockholder in a corporation has the property of the corporation taxed under the consolidated levy the corporation cannot later have a refund on the theory that it should have been assessed only five mills. That that is not such an erroneous assessment or tax that would entitle them to recover it.

See also the case of

S. Dak. Sec. Nat. Bk. v. Twinde, 217 N. W. 542.

PROPOSITION X.

Protest Not Sufficient.

It must be admitted that the taxes in question were not illegal and void within the definition of these terms by the Supreme Court of this state. If this is true, payment of the tax without a definite protest waives any right to complain and the taxpayer is estopped from contesting the validity of the payment. The payment of merely an erroneous assessment, if it is to be recovered subsequently, must be under a protest that is sufficiently definite to point out in a general way, at least, why it is claimed the tax is invalid. Few of the protests, as shown by the record in the case at bar, point out or attempt to even indicate in what respect it was claimed the tax was erroneous or illegal. The tax officials were left entirely to draw upon their own imagination for reasons to sustain the protest. Certainly such a protest is not sufficient

to authorize a taxpayer to subsequently bring an action for the recovery back of the taxes paid. In most cases no protest whatever was filed and the receipt was merely marked "Paid under protest" by the Treasurer. It isn't even shown who was protesting or what they protested about.

The right to recover taxes exists only when taxes are paid under protest and on compulsion to prevent seizing of goods.

Hawkeye Co. v. Marion, 110 Iowa, 468.

The only exception to this rule is that where the tax is *absolutely void* recovery might be had under the refund statute, even though paid without protest, if the illegality was discovered "'after he had paid the same."

In the case at bar no one claims the tax is void, but only that it is too much; and also the petitioner admits that it knew all about the illegality, before and at the time that it paid the tax.

In one or two cases no protest was made at all when the taxes were paid. In many other instances, the only protest was a statement written upon the tax receipt by the Treasurer and not by the taxpayer, stating that it was paid under protest. No details were given as to the reason for the protest. In a few cases there were filed with the Treasurer written protests, giving the reasons therefor. None of the protests which did not fully set out the reasons were such protests as the law would recognize, as the person protesting must point out to the tax authorities his objections and not leave them to guess as to what their objections are, or on what particular ground they claim the tax is erroneous or illegal. One of the United States Supreme Court cases cited by plaintiffs makes the remark that plaintiffs could not be expected to hunt through the tax records and find out who had been erroneously assessed. If this is correct, it would certainly apply just as strongly the other way, and the tax-

ing authorities, on a protest being made without any reasons annexed, could not be expected to look all through the records and pleadings to find out what errors there might happen to be to which the banks might be objecting. The volume of evidence in this case shows what an impractical proposition it would be to require the taxing authorities to make a guess, or to assume that any one could imagine that most of the assessments introduced in evidence by the plaintiffs would be considered as being in competition with banks. This would require a more vivid imagination than most taxing officers possess. In fact, only such an imagination as is possessed by some banks and their attorneys. See pages 869 to 871 of appellant's abstract, on pages 999 to 1003 of the printed record for form of protests.

Even if the protests had pointed out the objection of the banks that there were persons and corporations in competition with them who were being erroneously assessed, this would not be sufficient for the very reasons pointed out above, unless the objectors also pointed out the very individuals, or, at least, some of them, that they claimed were being so erroneously assessed. In no instance did the petitioner bank, in its protests, give the names of any individuals or companies who, in their opinion, were in competition with them and illegally assessed. The only place where this was done was in one or two of the appeals from the Board of Review, in which appeals the bank raised the objection that their competitors were not being properly assessed and named three or four of their competitors. In those instances, however, the suits and appeals were decided against the bank, so that their claim, in those cases, has been adjudicated against them. Even on the witness stand the bank officers were unable to name more than one or two of their alleged competitors. And in some instances could not even name one.

The rule seems to be that unless the tax is absolutely void, in order to recover back after it has been paid, the payment must have been made under protest and under a protest pointing out the very objection relied upon.

It is admitted by the petitioner bank, in its pleadings, that the tax officials of Polk County had authority to levy some tax upon their property. The only dispute is as to the amount of it. The tax, therefore, was not illegal or void. If there was any wrongful tax levied, it was merely through mistake in judgment of the taxing authorities. It was not, therefore a tax that was erroneous or illegal within the meaning of Section 7235 of the Code of Iowa, 1924, which is the section under which petitioner brought its suit.

PROPOSITION XII.

The Plaintiff Banks Have Not Come Into Equity With Clean Hands.

1.

The evidence shows, without contradiction, in fact, the officials of the plaintiff so testified, that all of the state banks assisted their customers in evading taxation as to mortgages sold to them by the banks. The method in which this was done was that the customer would not record his assignment. In some instances, it even remained in the hands of the bank itself, and, in many instances, all papers connected with the loans remained with the bank. In this way, there was nothing of record to show that the customer was the owner of this particular mortgage. Later, in order to assist the customer in keeping from the record anything that would indicate that he was the owner of the mortgage, and, knowing or suspecting, as they admit, that the customer was doing this for the purpose of evading taxation, the banks had, at

the request of the customer, released the mortgage on the record, although they had no longer any interest in the matter and knew they had no right to so release it. It was shown, in several instances, that the customer, to whom these mortgages were sold, did not return them for taxation. And the banks knew, or at least suspected, that this was the situation. It is true neither of the national banks engaged in the reprehensible practice for the simple reason that they owned and sold no real estate mortgages. However, the evidence does show that the Valley National Bank used the Valley Savings Bank as really a part of its own organization and, for certain purposes, and in the same way, the Iowa National Bank used the Des Moines Savings Bank & Trust Company, in connection with its business and for carrying on certain lines which the national banks themselves could not carry on, and both of these subsidiary state banks were officered and engineered by the same officers, although not always in the same position, as the national bank. The officers, therefore, of both the national banks connived at and assisted their subsidiary state banks in this practice of helping their customers evade taxation and they are, therefore, tarred with the same stick as the state banks and do not come into this case with clean hands. They are seeking here to recover back taxes paid by them when, at the same time and down to the present, they were assisting their customers to evade taxation and were thus defrauding Polk County and the subsidiary taxing bodies out of a large amount of taxes.

2.

The evidence further shows that both of the petitioner banks, either directly or indirectly, through an organization known as the Des Moines Clearing House Association, combined, contrary to the Statutes of Iowa, for the purpose of

raising the price of their commodity which they dealt in or decreasing the price of the commodity which they were purchasing, by making regulations through the Clearing House, which were observed by all the banks, decreasing the amount of interest that would be paid upon savings bank deposit, and, in addition thereto, making a charge for carrying small accounts, thus refusing the use of the bank to individuals of small means, contrary to public policy, and contrary to the purposes of the law under which they were organized, and the advantages of which they took to themselves. And such action was also illegal, because contrary to the Statutes of the State of Iowa as to restraint of trade and combinations. That the plaintiff banks, having thus violated the laws of the State, and having refused to carry out the purposes for which they were allowed to be incorporated by the State, have forfeited the right and are not in the position to now claim that they should recover back from the State, or from some of its branches, any amount of money which they may claim to have been erroneously collected from them, until, at least, they themselves are willing to do equity and abide by the laws of the State.

THE PLAINTIFF COMING INTO EQUITY MUST COME WITH CLEAN HANDS.

In discussing this proposition, it is necessary to call the Court's attention to what might be termed the "atmosphere" of this case as well as to specific evidence.

While seven cases were tried on the same testimony, each case stands separately and upon its own record. "It is stipulated * * * in each of the seven cases * * * that the cases shall not be consolidated, but that the testimony shall be taken at one time *insofar* as applicable shall apply to all the * * * cases * * *. Separate judgments and decrees shall be rendered in each case." (Tr. 4-5.) (R. 133-4.) It is, there-

fore, conceivable that one case can be successful and another fail.

We, therefore, want to call to the attention of the Court the specific things in the actions of each of these plaintiffs, which we believe conclusively establish their want of clean hands and that they positively have besmirched themselves with inequitable conduct and by that conduct created the situation such as they in their sanctimonious virtue *complain as unbearable* and *discriminatory.*

CENTRAL STATE BANK.

Outside of those considerations which are applicable to all the plaintiff banks, there is special testimony relative to each bank as to its attitude and conduct. The spokesman for the Central State Bank is its president (Tr. 2769), Grant McPherrin, who, as cashier in 1913, vice president in 1915, and president in 1921 (Tr. 2769) knew all about its business. He tells us that every bank, as a matter of practice, would sell a mortgage, make an assignment executed by the bank and the assignment would not be placed of record but at the expiration of the term of the mortgage, the release of the mortgage would be made by the bank. That was done as a matter of practice by the Central State Bank in the years 1918, 1919, 1920, 1921 and 1922. (Tr. 4684-5). "Many of the buyers of the mortgages, by failing to record their mortgages, were in truth and in fact dodging taxes", and Mr. McPherrin knew they might be or they might not be. (Tr. 4689.)

IOWA NATIONAL BANK AND DES MOINES SAVINGS BANK & TRUST COMPANY.

Mr. Clyde E. Brenton, its vice president, gave the following testimony:

Q. Do you happen to know whether or not it was a custom of your bank, the Des Moines Savings Bank & Trust Company, after it had sold a loan to an individual and made an assignment to the person who purchased it, to later release the mortgage of record in the name of the bank at the request of the person who had purchased the mortgage—or do you know as to that?

A. Very little, except that if we sold a loan and assigned it and the assignment had not been put of record and they came in and asked to make a release of the mortgage and returning us the assignment, we would do so.

Q. You would do so?

A. We would not force them to file their assignment and file the release.

Q. Nor would you force or investigate to see whether or not they had returned that loan for taxation, I assume?

A. We did not.

Q. Of course, you knew, did you not, that that was one method of dodging taxation used by certain people so inclined, that is not recording the assignment of the mortgage and then get the original mortgagee to release it later?

A. That would be up to the man making his own assessment. A great many of these people had offsets. We had nothing to do with their listing of moneys and credits or any of their other affairs.

Q. I don't think that answers the question, Mr. Brenton.

A. I suspected that that might have been done but we were not a party to it.

Q. But I understood you to state that you did not bother to investigate before you would release the mortgage at the request of the party to whom you had sold it,

about whether the mortgage had been returned by taxation or whether it had not.

A. We did not investigate. (Tr. 4864-4866.) (R. 789.)

It now appears unquestionably and absolutely undebatably that every one of the plaintiff banks who now complain that others are not taxed as they are taxed, participated in and were parties to an organized, common, deliberate method of preventing the public from being advised as to assessable property and thereby to defeat the public from collecting taxes from the persons who legally and under their honor were duty bound to pay. If that is not improper conduct, it possibly cannot be improper conduct on the part of the county to fail to exact taxes from taxpayers and that is the thing the plaintiffs complain of and upon which their whole suit relies. In other words, the plaintiffs complain that the taxing bodies have not been exacting their full measure of revenue from potential taxpayers and that, therefore, the plaintiffs are entitled to equitable remedy because they have been imposed upon. Now it appears from the plaintiffs' own testimony in each particular case that the public has been defeated in its efforts to collect public revenue because of the conspiracy or silent but active co-operation on the part of the plaintiff banks with tax dodgers.

It is no answer for the plaintiffs to say that that misconduct on their parts does not have anything to do with the failure of the taxing bodies with relation to the rate of levy because these acts are inseparable. The plaintiffs in each case complain that they are denied the equal protection of the law because others are not required to pay the proper amount of taxes. That particular act, to-wit: the failure to collect the proper amount of taxes was in part due to the illegal, immoral conduct of the plaintiff banks and if in any measure they have contributed to the situation of which they

complain, their complaint will not reach the listening ear and the Court of Conscience will refuse to extend its arm to assist the complainant.

There is another phase of this question which is properly presentable to the Court, both under the question of failure on the part of the plaintiffs to do equity and as a question of laches and that is: THE PLAINTIFFS KNEW OF THEIR COMPLAINT AS TO METHOD OF TAXATION BUT SAT IDLY BY, PERMITTING THE TAXING BODIES TO LOSE THE REVENUE WITHOUT THE ASSISTANCE OF THE PLAINTIFFS, AND THE PLAINTIFFS, INSTEAD OF PILING UP A MASS OF CLAIMS, WERE IN EQUITY DUTY BOUND TO ASSIST THE COMMUNITY TO PREVENT A LOSS INSTEAD OF AGGRAVATING A LOSS.

It is undoubtedly, even under plaintiffs' contention, the purpose of the statutes of Iowa and consented to by Section 5219, that all the plaintiff banks and competing capital should pay taxes under the general millage levy. The plaintiff banks complained not that they paid too much taxes but that others paid too little and seek the remedy not of compelling others to pay the full amount of taxes but to return to the plaintiffs what they deem a disproportionate excess.

The plaintiffs have no basis of complaint except in equity and if the basis of complaint is that the other taxpayers did not pay enough taxes, it should have brought its action when the remedy could have been obtained to compel the proper levy against the voting taxpayer rather than to sit by and permit the loss of taxes to accumulate and then on the other taxpayer's wrong, receive a reduction rather than to create a proper revenue for the taxing bodies.

Further, each institution knew the taxing bodies were levying and spending the moneys as and when received and incurring obligations in anticipation of the amounts to be received and probably making improvements that otherwise could not be undertaken.

CENTRAL STATE BANK.

Mr. McPherrin, the president, testified that it was brought to the bank's attention in 1919 that there was a question about the taxes and in 1919 the bank believed it had objections to the taxes and in 1920 and 1921 and 1922, but instead the bank paid the amount required for taxes set up in a reserve, and did not pay the taxes until November 30, in 1923. The bank knew that the taxes were levied for immediate and anticipated expense and that the moneys received would be distributed in governmental expense and that the money paid would be long distributed prior to September 14, 1925, the date the law suit was begun. (Tr. 4445-4449.) (R. 753.)

IOWA NATIONAL BANK AND DES MOINES SAVINGS BANK AND TRUST COMPANY.

Mr. Clyde Brenton, an officer, testified: As far back as January 1, 1919, it was discussed among the officials of the bank that the bank was being illegally assessed in that there were other people the bank considered in competition who were not being assessed at the same rate. (Tr. 4895-4896.) (R. 787.)

PROPOSITION XIII.

The Suits Should Have Been Brought by the Stockholders.

The proper plaintiff to recover taxes is the person who is ultimately entitled to the money.

37 Cyc., 1187.

In a suit by a national bank to recover back taxes paid on its real estate, where the real estate had not been deducted

from the value of the shares, held the wrong was to the stockholders and the banks could not maintain the suit.

Board v. First National Bank, 57 N. E., 728.

Payment of tax on shares by the bank is, in effect, payment by the stockholder.

Primghar Bank v. Rerick, 96 Iowa, 238.
Head v. Board of Review, 170 Iowa, 300.
First Nat'l Bank v. Council Bluffs, 182 Iowa, 107.
Andrew, Supt. v. Munn, Treas., 218 N. W. 526.

A state law authorizing persons against whom claim is made to bring action against claimant, to determine claim, held, to give bank no right to bring action to enjoin County Treasurer from collecting portion of taxes assessed upon its stock.

First National Bank v. Patterson, 176 Pac. 498.

Payment of taxes on a stockholder's shares of stock is in effect the declaring of a dividend by the bank.

Redhead v. Iowa National Bank, 127 Iowa 572.

A consignee cannot maintain an action to recover back taxes paid by him on goods held on consignment.

Stickney v. Bangor, 30 Me. 404.

The taxes on the shares of stock are the taxes of the stockholders and can only be recovered by them.

The shares must be assessed as the property of the owner, and the payment of the shares by the bank is, in effect, the payment by the stockholder.

Primghar Bank v. Rerick, 96 Iowa, 238-242-4.

In a case holding that a county treasurer could not recover taxes on the stock of a bank, from the bank, unless it

was shown that the bank had property of the stockholders in its possession, our Supreme Court says:

> "A stockholder in a national bank cannot be taxed upon his stock at a greater 'rate than is assessed on other moneyed capital in the hands of individuals'. Code Section 818. This authorizes the stockholder to deduct from the cash value of his stock the amount of his valid debts."
> *Farmers Nat'l Bank v. Hoffman*, 93 Iowa, 122-4-5.

Though the bank may pay the taxes, this is done, not on its behalf, but for the shareholders.

1st Nat. Bk. v. Council Bluffs, 192 Iowa, 107-14.

Though the bank may pay taxes, this is done, not on its behalf, but for the shareholders. Neither the corporation nor its property is assessed.

Head v. Board, 170 Iowa, 300-5-6.
Sec. 7235, Code 1924, as to Refund of taxes.

We have already pointed out the authorities holding that it was the stockholders who were assessed and not the banks, and that therefore the stockholders are the ones who are entitled to recover. We would like to apply a little further the law as laid down in the cases, to the facts as developed in the cases at bar. The lists of stockholders of the various banks in the various years will be found beginning on page 124 of Appellees' Denial of Abstract and continuing to page 146 now pages 1197-1205 of the printed record. We will not take the time or space to go through the statements of all of these banks in order to show that there was a material number of stockholders who owned stock at various times during the period that these taxes were paid who are not now stockholders in the banks. A statement as to the stockholders of the Central State Bank is typical of all of them. Taking first Exhibit "Z-204" which is a list of the stockholders of the Central State Bank as of September 15, 1925, more than a

year before these suits were brought, in that list there were all together approximately one hundred and five stockholders. Forty-four of these one hundred and five stockholders owning six hundred and one shares of stock out of a total of twenty-five hundred shares were not stockholders on January 1, 1919. Turning to Exhibit "Z-199" the list of the stockholders whose stock was assessed as of January 1, 1919, we find that 20 stockholders out of 76 who owned seven hundred and seventeen shares out of a total of twenty-five hundred shares in 1919 were not stockholders in 1925 or when the suit was brought. In other words, almost one-third of the stock that was outstanding on January 1, 1919, was not owned when this suit was brought by the parties who owned it in 1919. A checking through of the statements of the other banks would show practically the same situation so that even if we should be wrong in our contention that the banks cannot represent even the stockholders who were stockholders in 1919 and the other years when the taxes were paid, and who were still stockholders when the suits were brought, we are certainly right in our contention that the bank cannot by any stretch of the imagination represent the stockholders who are no longer connected with the bank. And the above evidence shows that the stockholders who are no longer connected with the bank are a substantial number and represent a substantial amount of the capital stock.

Nor is it reasonable that the banks should claim or pretend to represent the stockholders who actually paid the taxes. The impracticability of the theory, that the banks represent stockholders who are no longer connected with it, has been thoroughly illustrated by what has occurred during the pendency of this very case.

The Iowa National Bank and the Des Moines Savings Bank and Trust Company in the first instance consolidated with the Des Moines National Bank and organized an ap-

parently new corporation under the name of Iowa-Des Moines National Bank. On top of this, however, there was another amalgamation or *quasi* consolidation, by which the stock or at least a majority of the stock of the combined bank was sold to a corporation known as the Northwest Bancorporation. The understanding being, according to the newspapers, that any stockholder in the Iowa-Des Moines National Bank could exchange so many shares of his stock for so many shares in the Northwest Bancorporation. If, therefore, the Iowa National Bank and the Des Moines Savings Bank are entitled to recover instead of the stockholders either for themselves as corporations or for the benefit of the present stockholders, the money when obtained would have to be paid over by them, at least more than one-half of it, to the Northwest Bancorporation, a corporation which had nothing to do with the matter at the time when the taxes were levied and paid. We merely use these recent events as an illustration to show what a precarious position even the present stockholders of these banks would be placed in if it should be found that the banks are entitled to recover these taxes for themselves rather than for the stockholders. In other words, the acts of these banks themselves since this suit was brought has conclusively shown that the banks' claim that they are entitled to maintain these suits as banks cannot be maintained. Nor can the proposition that they have a right in some mysterious way to represent even the present stockholders in the bank be followed out to a logical conclusion without coming against insuperable obstacles. How can the court be assured that the consolidated bank will pay over to the former stockholders of the former Iowa National Bank the money recovered by it for them in this case? And if they do not so turn it over how are the respondents in this case protected from subsequent suits by the stockholders themselves to recover the same taxes?

As heretofore briefly pointed out, the evidence shows definitely that during these years all of the banks declared dividends in each year over and above the amount that they paid out for taxes, in addition to that passing large amounts of undivided profits to surplus. So that it conclusively shows that the taxes in each year were paid out of the undivided profits which would otherwise have been declared as dividends to the stockholders.

The banks therefore had no claim against the stockholders for any refund as the taxes were paid in the first place out of the money of the stockholders which would otherwise have gone out to them in dividends or been placed in the surplus.

The tax is levied against the stockholders upon their shares of stock. It has repeatedly been held that this is not a tax against the bank, but is only a tax against the stockholders. The stockholders are the ones primarily liable for this tax. The banks are only secondarily liable to the extent that they have property belonging to the stockholders in their hands. If the taxes, therefore, were erroneously assessed and paid, the money so paid belongs to the stockholders and could only be recovered by them, or their assignee. There is no claim in this case that the right to recover back these taxes had been assigned by any of the stockholders. The evidence shows that many people, who were stockholders when the taxes were assessed and paid, were no longer stockholders at the time this suit was brought, or at the time the claim was made to the Board of Supervisors to recover back the taxes. Even assuming, for the sake of the argument, that the bank might represent the stockholders, who were stockholders when the taxes were levied, and who are still stockholders, it certainly could not represent the stockholders who paid the taxes years ago and are no longer stockholders in the bank. There is, therefore, a defect in parties plaintiff, at least to this extent.

Even though these taxes were paid by the banks originally, it has, in effect, been refunded to the bank by the stockholders, for the simple reason that the bank paid the taxes out of their undivded profits which would otherwise have been declared as dividends or passed as surplus. In either case, the stockholder paid the taxes, because the book value of his stock was decreased exactly by the amount of the taxes paid. When he sold his stock, he sold it on this depreciated basis, and, therefore, there has never been refunded to him the amount which he paid for these taxes, either by the bank or by the person who purchased his stock. The right to recover these taxes, therefore, if they have been erroneously taken away from him, rests in the stockholder alone. The evidence shows that all of these payments were made during a period when they paid out large dividends, or put large amounts to the surplus during the same period, more than enough to have paid these taxes. All the property of the bank, therefore, over and above its debts and liabilities, belonged to the stockholders and it was out of this balance, existing over and above its liabilities, that the bank, in each instance, paid the taxes. The taxes were, therefore, paid out of the property of the stockholders and it is mere quibbling to say that, because the bank did not declare the larger dividend, in the first place, and then deduct the taxes out of the dividends, the taxes were not paid by the stockholders. The officials of the banks themselves admitted that the method pursued, arrived at exactly the same result as far as the book value of the shares was concerned, as if they had set aside a fund for paying taxes, which was made up out of deductions from the dividends declared to the stockholders, or as if they had declared the dividends and each stockholder had paid back enough to pay the taxes.

PROPOSITION XIV.

Would the Five Mill Levy, If Properly Applied to Banks, Have Produced Less Taxes Than the Basis Upon Which They Were Assessed?

If the plaintiff banks had been assessed five mills on the dollar on all of their moneys and credits, as shown by the evidence in this case, the tax would have been much more than the amount that they were compelled to pay under the assessment complained of.

The amount actually paid by the banks, on their present assessment, is much less than a five mill assessment, without deduction of debts. Therefore, individuals, who had no debts to deduct, paid a higher rate than the banks. There is no showing that many of the individuals, whose assessment rolls were offered, had any deductions. Therefore, their rate was higher than the rate at which the banks were actually taxed, because, in the method provided by the statute and under which the banks were assessed, they have a right to deduct, not only all of their debts, but all of their real estate and their amount due depositors. The amounts due depositors by the banks is not a debt. It has so been held by the courts. The banks were the actual owners of all the moneys and credits in their possession. They became the owner of all the money deposited with them. Of course, they must pay it back, under certain circumstances, but, as long as they held it, they were the owner, and the courts have so held. If, therefore they were required to pay upon all the property owned by them and allowed to deduct their actual debts, such as bills payable and accounts payable, but could not deduct the amount of their deposits, which are not debts in that sense, then the amount of the tax they would have been required to pay on the five mill levy would have been much in excess of the tax they did

pay under the present assessment. So they have nothing to complain of, on that ground, and would not be any better off if the five mill levy had been applied to them. The individual who had a hundred thousand dollars loaned out on mortgages, and who had no debts to deduct and who was assessed five mills on the dollar, on the whole hundred thousand, would pay $500.00, a much higher tax than a bank which had a hundred thousand dollars invested in mortgages; $15,000.00 of which was its capital and $85,000.00 of which was deposits or depositors' money, if the bank was assessed on the same basis on which the banks were assessed in this case, namely, with deposits deducted and the consolidated levy of 134 mills applied to 20% of the remaining capital as it would only pay $402.00. As a matter of fact, therefore, there was no discrimination against the banks in assessing people who had no debts to offset against their mortgages on the basis of five mills on the dollar, even if they were in competition with the banks.

The petitioner has not been hurt by the imposition of the tax complained of. This is true for at least two reasons. In the first place, petitioner is not assessed upon the capital that is actually employed by it in its business as it should be if it were assessed as moneys and credits, but is assessed only upon the capital, surplus and undivided profits less the real estate. The record shows, and it is without dispute, that the great part of petitioner's capital is composed of the deposits. If it were not for the deposits, petitioner could not and would not operate in the manner it does and could not make the profit that has been realized by it upon its stock. Yet petitioner pays no tax upon this capital which exceeds by many million the amount of the bank's capital, surplus and undivided profit upon which it is taxed. If the deposits were added to the bank's capital as it is now assessed, and it were all taxed as moneys and credits, the amount which

petitioner would be required to pay would far exceed the payments under the rate it is now assessed.

Then too, it is pertinent to inquire how much have the taxes of the petitioner been increased because of the alleged discrimination. There is no showing that they have been increased or that any unjust burden has been imposed upon them. The other taxpayers in the taxing district must of necessity share in any additional burden because of the alleged discrimination. The taxes paid by the other taxpayers far exceed that paid by petitioner.

In fact, taxes paid by petitioner are but a fractional part of all the taxes paid in the taxing district as was shown by the evidence. We believe it is impossible for petitioner to show in dollars and cents that it has been hurt at all by the alleged discrimination. In any event the record is barren of such evidence. If it is granted relief the other innocent taxpayers who have paid their full share of taxes will have to pay these recovered taxes to the bank. What equity is there in this, the other taxpayers have done no wrong.

In the absence of a showing for either of the reasons urged, that plaintiffs have been hurt, under the well established and recognized rules of law, they cannot question the unconstitutionality of the proceedings.

PROPOSITION XV.

The Actions Are Barred by the Statute of Limitations.

The question under the Statute of Limitations, aside from the question that arises in some of the cases as to the taxes for the year 1919, is, whether or not, Sub-division 4 of Section 11007 of the Code, containing the three year limitation in actions against a sheriff or other public officer, applies to these cases. It would seem to us that there is reasonable ground for holding that the three year statute does apply,

for the ground of recovery in this case is based on the omission of an official duty upon the part of the Auditor and Treasurer in not properly assessing the alleged competing companies. Or, if not an act of omission, then the act of the Auditor in changing the assessments so as to assess the alleged competing capital as moneys and credits. In view, however, of all the other questions under which we believe the case should be decided in favor of the defendants, we will not make any extended argument on the question, but merely suggest it for the consideration of the court.

Section 11007 of the Code of Iowa, Subdivision 4, reads as follows:

> "11007. Period of. Actions may be brought within the times herein limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially declared: * * * 4. Against sheriff or other public officer. Those against a sheriff or other public officer growing out of a liability incurred by the doing of an act in an official capacity or by the omission of an official duty, including the nonpayment of money collected on execution, within three years."

See also the following case decided by the Supreme Court of Iowa:

Murphy v. Supervisors, 215 N. W., 744.

PROPOSITION XVI.

No Evidence of Competition—Relating to Assessment for 1919.

The years and assessments and taxes paid in question in this case are:

Assessments for the years 1919, 1920, 1921 and 1922.
(R. 0003—Par. 5 of Petition.)

Taxes paid for the years 1919, 1920, 1921 and 1922.
(R. 0015—Par. 27-28 of Petition.)

Shares of corporation stock shall be assessed at the value on the first day of January of each year. (Iowa Code, 1897—Section 1323.) While this section refers to Iowa corporations, it is provided by Iowa Code 1913 Supplement, Section 1366, the assessment roll is to be completed and laid before the board of review "on or before the first Monday of April in each year".

The assessor begins his work and the assessors meet before January 13th of each Year (Iowa Code 1897—Section 1359).

It follows then the classification of the business is unavoidably based on transactions prior to the assessment. As a result in 1919, it was the business as it was conducted in 1918 that determines the classification of the business for 1919 assessment. It is not, as relates to the 1919 assessment, material what any company did as business in 1919. It is the business done in 1918 that determines its character as to the classification of the assessment for 1919.

There is absolutely no testimony of any kind or character by inference or otherwise to show the business of the plaintiff bank or any of its alleged competitors in the year 1918.

We could not object to the testimony of business done in 1919, 1920 or 1921 for this reason, as testimony for those years was relevant because of its effect upon the assessments for the years 1920, 1921 and 1922 respectively, but we did object to the admission of the assessment rolls for the 1919 assessment because there was no evidence as to character and amount of business done in 1918. We did, upon the trial continuously and consistently, object to testimony as to business methods in the year 1922.

The record, page 0351, shows this objection:

"The following evidence was received subject to the specific objection by counsel for defendants that the business carried on by the bank in 1922 is immaterial and beyond the issues of the case."

We respectfully submit, it is plain that there is no evidence of any competition for the period existing just prior to and at the time of the assessment and therefore there is nothing on which anything can be based as a claim of recovery of the taxes, penalties and interest for the taxes for the year, 1919.

PROPOSITIONS XVII AND XVIII.

Not a Final Judgment.

The petitioners herein have not obtained a final judgment in the court of last resort of Iowa and are not therefore entitled to a writ of certiorari in this honorable Court. The record herein discloses that the petitioner, within the time prescribed by the statutes of Iowa, filed its notice of intention to file a petition for rehearing with the Supreme Court of Iowa. The respondents have also filed notice of intention to file petition for rehearing in the Supreme Court of Iowa. The record as shown by the certificate of the clerk of the Supreme Court of Iowa on pages 1409-1414 of the printed record shows that the matter is undisposed of and still pending so far as the record shows. Under the statutes of Iowa it is discretionary with the Supreme Court of Iowa whether they will grant a rehearing or not. If a rehearing is granted and the Supreme Court of Iowa so determines, it may decide the case anew and reach an entirely different result from the decision on which petitions for rehearing were to be filed. The petitioners herein may, in the event of a rehearing in the Supreme Court of Iowa, thus obtain a decision favorable to their contention and granting them the relief

demanded. Until the Supreme Court of Iowa has exercised its discretion as to whether or not a rehearing will be granted, a decision therein is not final in the event a petition for rehearing has been filed. This honorable Court has passed upon the question here presented on several occasions. In *Andrews v. Virginian Ry Co.*, 248 U. S. 272, at 275 it is said:

> "It is true that under the law of Virginia in a case like this the power of a court of appeals to review the judgment of the trial court was gracious or discretionary, and not imperative or obligatory; but the existence of the power, and not the considerations moving to its exercise, is the criterion by which to determine whether the judgment of the trial court was final at the time of its apparent date, or because so only from the date of the happening of the condition—the action of the court of appeals—which gave to that judgment its only possible character of finality for the purpose of review in this court. Nor is the result thus stated a technical one, since it rests upon the broadest considerations inhering in the very nature of our constitutional system of government, and material, therefore, to the exercise by this court of its rightful authority. * * *"

In *Citizens Bank v. Opperman*, 249 U. S. 448, 450 this honorable Court said:

> "Where a petition for rehearing is entertained the judgment does not become final for purposes of our review until such petition has been denied or otherwise disposed of and the three months' limitation begins to run from date of such denial or other disposition."

So in the case at bar notice of intention to petition for rehearing having been filed, the petitioner herein is not entitled to certiorari until the petitions for rehearing have been filed and finally disposed of.

The petitioner by filing its notice of intention to file a petition for rehearing has again invoked the action of the Supreme Court of Iowa, and if its petition is filed there is no

final judgment until the same is acted on by the Iowa court. If the petitioner does not file its petition for rehearing in compliance with its notice, then, in effect, after invoking the further action of the Iowa court and setting the machinery in motion by its notice, it has abandoned or dismissed the same, which is equivalent to accepting and acquiescing in the judgment of the Iowa court. It would be in the same position as if, after appealing originally to the Supreme Court of Iowa it had voluntarily dismissed its appeal, thus by its own action preventing a final decision by the highest court of the state, such as is required to entitle it to come to this court by certiorari.

There is also no final decision until the procedendo has been sent down by the Supreme Court of Iowa to the District Court. The record not only fails to show that the procedendo has been sent down, but on the other hand it shows positively that it has not been sent down. At the request of petitioner an order was entered by the Supreme Court that the procedendo should *not* issue for the present. See Page 1399 of printed record. By this very action petitioner has recognized that if the procedendo had been sent down it would have had a final judgment against it as to which it could do nothing further in the State Courts. By requesting the Supreme Court not to send down the procedendo it in effect requested that court to retain jurisdiction so that it could make further orders in the case if desired, and it also thereby prevented the judgment from being final in such sense as to give it the right to appeal to the Supreme Court of the United States, under the rulings of that court.

In conclusion we wish to expressly call the court's attention to the case of

Nelson v. First National Bank of Sioux City, 42 Fed. (2nd) 30,

decided by the Circuit Court of Appeals of the 8th Circuit on June 26, 1930. We have already cited this case as supporting our proposition that the petitioner in this case had not exhausted all of the administrative remedies furnished by the Iowa law.

We desire to dwell at a little further length on this case for the reason that not only is it an authority on that proposition but also is authority on some other points in this case.

We particularly wish to draw attention to it because of the statement made in that case as to the case of

Munn v. Des Moines National Bank, 18 Fed. (2nd) 269,

which is relied upon so strongly by counsel for petitioner in the present case and which case was also decided by the Circuit Court of Appeals of the 8th Circuit. The Circuit Court of Appeals in the *Nelson* case says that the *Munn* case cannot be considered as an adjudication or finding that a right to appeal from the Assessor to the Board of Review was an inadequate remedy, that the decision in the *Munn* case was based upon the peculiar facts in that case. Facts, as we have heretofore set out, which are radically different from the case at bar. In the case at bar the petitioner knew of this alleged discrimination against it and knew it was occurring each year as far back as the year 1919, and made no effort whatever to have it remedied by the Board of Review. If its officers knew in 1919 they were being discriminated against they then had a whole year in which to have found out if they did not already know, as they said they did, in whose favor this discrimination was being exercised. And it would have been a matter of very little work to

have discovered or checked up between January 1, 1920 and May 1, 1920, when the Board of Review met, to see whether or not these same discriminations had been made during that year, and so on during the succeeding years. The record in this case shows that practically the same persons and corporations appeared in the evidence offered by the petitioner, in each of the years as to which complaint was made, as being favored or as to whom discrimination was made against the petitioner. Of course, a few of them did drop out each year and a few would come in, but generally the discriminations were in favor of the same persons and corporations during each of the years as to which complaint is made. So that the petitioner in this case had ample information and opportunity to have presented the matter to the Board of Review and have asked that on account of such discrimination its assessment should be as moneys and credits.

The *Nelson* case was one where relief was sought by injunction and the Court held that as to the years in which they might have appealed to the Board of Review but did not the petitioners could have no relief. One of the banks, however, for one year did take such appeal to the Board of Review and the Circuit Court of Appeals held that that bank as to that one year was not prevented from taking the matter up with the Federal or State Court. That whether it sought relief from the state court or the federal court it was no longer administrative process but judicial. In the case at bar the petitioner in most of the years did not, while it took an appeal to the Board of Review, raise the question now raised in this suit as to discriminations. It possibly, in one year, did raise the question of discrimination against it. In the other years it did not. However, instead of them taking the case for injunctive relief to either the Iowa Courts or Federal Courts it further followed the provision of the

Iowa statute and appealed to the Iowa Court and the appeals to the Iowa Court, whether it raised this question or whether it did not, were all decided against it, and it carried the matter no further. So that in the cases where it did not appeal to the Board of Review it cannot now have relief under the rules laid down in the *Nelson* case and in the year that it did raise the question of discrimination it sought its relief in the State Court and such relief was there denied and the suit dismissed so that there is an adjudication against it for that year. Therefore, under the rules as announced in the *Nelson* case there can be no recovery here on the part of the petitioner.

There is, however, another point decided by the *Nelson* case which would deprive the petitioner of relief also, and that is that the remedy sought here for repayment of taxes erroneously paid or illegally exacted under Section 7235 of the Code of Iowa, 1924, is not available to the petitioner in such a case as this. That that statute only applies where the officer or officers had no authority to levy a tax or it was in some other respects illegal and does not include such a case as this where the property was erroneously taxed. In the case at bar it was an irregular and not an illegal tax and, therefore, the petitioner could not pursue the remedy he is pursuing in the case at bar.

We submit, therefore, that our claim that the petiitoner is not entitled to recover in this case and that the finding of the Supreme Court of Iowa should be approved and affirmed is amply established by the facts and the authorities cited, and on more than one ground. We do not wish, however, to convey the impression that by only mentioning in this conclusion some of the grounds that prevent petitioner's recovery that we wish to minimize or abandon the others and we are insisting upon all of the grounds alleged, including the matters of practice, that the petitioner has not

pursued his remedy in the state court to a conclusion and that no final judgment has yet been entered from which he could come by certiorari to the Supreme Court of the United States. Certiorari of itself is predicated upon and presupposes that all administrative remedies have been exhausted and the indisputable facts show they have failed to follow and exhaust all their administrative remedies.

Respectfully submitted,

ESKIL C. CARLSON,
MAXWELL A. O'BRIEN,
Attorneys for Respondents.

GEORGE A. WILSON,
CHAS. HUTCHINSON,
on the Brief.

APPENDIX.

13 Corpus Juris 444; Section 381.

"Interference with Duties of Quasi Public Corporations. The general rule has been laid down that any contract of a corporation by which it disables itself from performing its duties to the public, or subordinates to its private interests the rights and conveniences which it impliedly undertakes to secure to the community, is invalid as contrary to public policy. So agreements by railroad companies and other common carriers, water and gas companies, and other quasi public corporations owing duties to the public, which interfere with the performance of such duties, are illegal and void as being contrary to public policy, the question not depending on whether the public has in the particular case suffered any detriment, but on whether the contract is in its nature such as might be injurious to the public. This principle has been applied, for example, to an agreement or combination by or between railroad companies leasing or conveying property necessary to enable them to perform their duties to the public, or discontinuing a line, etc.; to an agreement between two connecting railroad companies that one should discontinue the use of a part of its road by which it has long been connected with a line of steamboats at tidewater, which was one of its termini under its charter, and that the other should use its influence to prevent the extension of a third road which would interfere with the business of the first one; and to agreements by which a railroad company binds itself not to build its railroad along a particular route, to locate, or not to locate its station or depot at a particular point, or to locate it at a particular point; or to furnish or not to furnish sidings, unless, according to some of the cases, where the agreement is to locate along a particular route or at a particular point, it is not restricted from locating lines, stations, or depots along other lines, or at other points also, or otherwise doing whatever the public convenience may require. Contracts by common carriers and other quasi public corporations making undue discrimination in favor of particular persons are generally prohibited by statute, but they are also illegal as contrary to public policy."

38 Corpus Juris 770; Section 412.

"Necessity of existence of funds. Mandamus will not issue to compel the payment of a claim against a municipality where no appropriation has been made for such payment, or where there are no funds on hand applicable to the payment of the claim; and funds appropriated for one purpose will not be compelled to be devoted to another, although, where designated claims are required by statute to be paid out of a "general fund" the fact that a special fund has been set apart for payment of such claim and had been exhausted will not prevent the issuance of mandamus to compel payment of such claims out of the general funds. Where the funds are not on hand, mandamus to pay when the funds shall be received cannot issue. The rule that mandamus will not issue to compel an officer to perform has been applied to prevent the issuance of a mandamus to compel the payment of a claim from a fund properly applicable to the indebtedness where such fund has been wrongfully dissipated or diverted; but there are decisions that hold that mandamus will issue notwithstanding the fund from which payment should have been made had been wrongfully appropriated or diverted to other purposes, provided it is clearly made to appear that the officer against whom the writ is sought actually received moneys from which the claim would be payable."

1913 Code, Section 1366. (Supplement).

"Assessors" books returned. That section thirteen hundred sixty-six of the code be and the same is hereby repealed and the following enacted in lieu thereof:

"'Such rolls shall be laid before the local board of review on or before the first Monday of April in each year for correction, and when such correction has been completed, the assessor shall proceed to make up the assessor's books in duplicate from such assessment rolls, allotting a sufficient number of pages to each letter, and return to the county auditor, together with the assessment rolls, plat book, and all statements which have been furnished to him in connection with the assessment, and the county auditor shall foot up each column of numbers and values on each page and enter such footings in recapitulation sheets, and not later than the

tenth day of May return one of the books to the township clerk, and to the city or town clerk.'"

1897 Code, Section 1359.

"Meeting of assessors. The county auditor of each county shall, before the third day of January annually, issue a call to all the assessors of his county to meet at his office, or some other place at the county seat, within ten days for consultation, and to receive from such auditor such information as shall tend to the proper discharge by them of their official duties. It shall be the duty of each of such assessors to attend such meeting, and they shall be allowed pay of one day for such attendance, and mileage at six cents per mile one way."

1897 Code, Section 1323.

"Shares of corporation stock. The shares of stock of any corporation organized under the laws of this state, except those which are not organized for pecuniary profit, and except corporations otherwise provided for in this act, shall be assessed to the owners thereof, at the place where its principal business is transacted, the assessment to be on the value of such shares on the first day of January in each year; but in arriving at the total value of the shares of stock of such corporations, the amount of their capital actually invested in real estate owned by them, either in this state or elsewhere, shall be deducted from the real value of such shares, and such real estate shall be assessed as other real estate, and the property of such corporation, except real estate situated within the state, shall not be otherwise assessed. Every such corporation annually, on or before the twenty-fifth day of January, shall furnish to the assessor of the assessment district in which its principal place of business is located a verified statement, showing specifically, with reference to the year next preceding the first day of January then last past:

"1. Total authorized capital stock and number of shares thereof;

"2. Number of shares of stock issued and par value of each;

"3. Amount paid into the treasury on each share and the total capital paid in;

"4. Description and value of each tract of real estate owned by said corporation;
"5. Date, rate per cent. and amount of each dividend declared, and the amount of capital on which each such dividend was declared;
"6. Gross and net earnings, respectively, during the year, and the amount of surplus;
"7. Amount of profit added to sinking fund;
"8. Highest price of sales of stock between the first and tenth days of January of the current year;
"9. Highest price of sales of stock during the preceding year and average price of such sales."

1897 Code, Section 1417.

"Refunding erroneous tax. The board of supervisors shall direct the treasurer to refund to the taxpayer any tax or portion thereof found to have been erroneously or illegally exacted or paid, with all interest and costs actually paid thereon. In case any real estate subject to taxation shall be sold for the payment of such erroneous tax, interest or costs, the error or irregularity in the tax may be corrected at any time provided in this chapter, but such correction shall not affect the validity of the sale or the right or title conveyed by a treasurer's deed, if the property was subject to taxation for any of the purposes of which any portion of the taxes for which the land was sold was levied, and the taxes were not paid before the sale, or the property redeemed from sale."

1927 Code, Section 7235.

"Refunding erroneous tax. The board of supervisors shall direct the treasurer to refund to the taxpayer any tax or portion thereof found to have been erroneously or illegally exacted or paid, with all interest and costs actually paid thereon."

1924 Code, Section 12440.

"Definition. The action of mandamus is one brought to obtain an order commanding an inferior tribunal, board, corporation, or person to do or not to do an act, the perform-

ance or omission of which the law enjoins as a duty resulting from an office, trust or station."

1924 Code, Section 12441.

"Discretion—exercise of. Where discretion is left to the inferior tribunal or person, the mandamus can only compel it to act, but can not control such discretion."

1927 Code, Section 12452.

"Form of order—return. The order shall simply command the performance of the duty, shall be directed to the party, and may be issued in term or vacation, returnable forthwith, and no return except that of compliance shall be allowed; but time to return it may, upon sufficient grounds be allowed by the court or judge, either with or without terms."

1927 Code, Section 12456.

"When writ may issue. The writ of certiorari may be granted when authorized by law, and in all cases where an inferior tribunal, board, or officer exercising judicial functions is alleged to have exceeded his proper jurisdiction, or is otherwise acting illegally, and there is no other plain, speedy and adequate remedy."

1924 Code, Section 7149.

"Corrections by auditor. The auditor may correct any error in the assessment or tax list, and may assess and list for taxation any omitted property."

1924 Code, Section 6992.

"Stock and 'moneyed' capital denied deduction. No deduction for debts shall be allowed from the shares of stock of any state, savings or national bank or loan and trust company, nor from moneyed capital used in competition with banks, within the meaning of section 5219 of the revised statutes of the United States."

1924 Code, Section 11007.

"Period of. Actions may be brought within the times herein limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially declared:

"1. In actions for injuries from defects in roads or streets—notice. Those founded on injury to the person on account of defective roads, bridges, streets, or sidewalks, within three months, unless written notice specifying the time, place and circumstances of the injury shall have been served upon the county or municipal corporation to be charged within sixty days from the happening of the injury.

"2. Penalties or forfeitures under ordinances. Those to enforce the payment of a penalty or forfeiture under an ordinance, within one year.

"3. Injuries to person or reputation—relative rights—statute penalty—setting aside will. Those founded on injuries to the person or reputation, including injuries to relative rights, whether based on contract or tort, or for a statute penalty, within two years; and those brought to set aside a will, within two years from the time the same is filed in the clerk's office for probate and notice thereof is given; provided that after a will is probated the executor may cause personal service of an original notice to be made on any person interested, which shall contain the name of the decedent, the date of his death, the court in which and the date on which the will was probated, together with a copy of the will; said notice shall be served in the same manner as original notices and no action shall be instituted by any person so served after one year from date of service.

"4. Against sheriff or other public officer. Those against a sheriff or other public officer, growing out of a liability incurred by the doing of an act in his official capacity or by the omission of an official duty, including the payment of money collected on execution, within three years.

"5. Unwritten contracts—injuries to property—fraud—other actions. Those founded upon an unwritten contract, those brought for injuries to property, or for relief on the ground of fraud in cases heretofore solely cognizable in a court of chancery, and all other actions not otherwise provided for in this chapter, within five years.

"6. Written contracts—judgments of courts not of record—recovery of real property. Those founded on written contract, or on a judgment of any courts except those provided for in the next subdivision, and those brought for the recovery of real property, within ten years.

"7. Judgments of courts of record. Those founded on a judgment of a court of record, whether of this or of any other of the United States, or of the federal courts of the United States, within twenty years.

"8. Judgment quieting title. No action shall be brought to set aside a judgment or decree quieting title to real estate unless the same shall be commenced within ten years from and after the rendition thereof."

1927 Code, Section 12880.

"Petition for rehearing. If a petition for rehearing is filed, it shall suspend the decision, if the court or one of the judges upon its presentation so order, until after the final decision on the rehearing."

1927 Code, Section 12881. Subd. 4.

"Rehearing—notice. Written notice of intention to petition for a rehearing shall be served on the opposite party or his attorney and the clerk of the supreme court within thirty days after the filing of the opinion, or within such time as the court may by rule prescribe."

1927 Code, Section 12883.

"Petition may constitute brief and argument. The petition may be made the argument or a brief of authorities relied upon for rehearing. The adverse party may file a printed argument in response. If the party applying for a rehearing shall give notice of oral argument in his petition, then both parties shall be entitled to be heard orally, unless the party giving notice waives argument."

Rule 27, Supreme Court of Iowa.

If the case is triable upon errors assigned and not *de novo* and appellant has given notice of oral argument, he will be

entitled to open and close. If appellee alone gave the notice he will be entitled to open the argument and appellant must confine his remarks strictly to a reply. If the cause is triable *de novo* the party upon whom rests the burden of the proof may, if he has given the requisite notice, open and close the argument. If he has not given notice he will be confined strictly to an answer to the argument for the other side. No oral argument shall exceed one-half hour in length, unless an extension of time be granted before the argument is commenced or it becomes apparent during the course of the argument that more time is necessary, whereupon the court may grant additional time. On original submission two attorneys may be heard on each side; but in the event counsel opening the argument is not entitled to reply, but one attorney shall be heard for either party. Reply arguments shall be limited to fifteen minutes. On petitions for rehearing only one attorney shall be heard for either party, the petitioner to have not exceeding twenty and the respondent not more than fifteen minutes, unless extensions be granted by the court.

SUPREME COURT OF THE UNITED STATES.

Nos. 15 and 16.—October Term, 1931.

15 Iowa-Des Moines National Bank, Petitioner, *vs.* E. R. Bennett, Chairman, et al.

16 Central State Bank, Petitioner, *vs.* E. R. Bennett, Chairman, et al.

On Certiorari to the Supreme Court of Iowa.

[December 14, 1931.]

Mr. Justice Brandeis delivered the opinion of the Court.

These cases are here on certiorari (283 U. S. 813) to the Supreme Court of Iowa. They were argued together and involve, in the main, the same questions. The petitioner in No. 15 is the Iowa-Des Moines National Bank. The petitioner in No. 16 is the Central State Bank, an Iowa corporation. In each case, it is charged that, for the years 1919, 1920, 1921 and 1922, the taxing officers of Polk County exacted from petitioner taxes on shares of its stock at rates higher than were exacted of competing moneyed capital; and that in 1923 petitioner paid the taxes with interest and penalties under protest, after threat of seizure of its property. In each case it is alleged that this unequal taxation contravened both the state law and the equal protection clause of the Fourteenth Amendment. In No. 15, it is also charged that § 5219 of the Revised Statutes of the United States was violated. In each case the petitioner seeks by an action of mandamus to compel the appropriate county officers to refund the part of the taxes alleged to have been illegally exacted, and the interest and penalties. The county officers denied the discrimination charged and also set up many special defenses.

The trial court, after hearings which occupied more than sixteen weeks, denied relief in each case without making findings of fact or rendering an opinion. Its judgments were affirmed in

the highest court of the State by a divided bench. 232 N. W. 445. The case is before us on an extensive record; but we have no occasion to examine the controverted issues of fact and of state law. The Supreme Court found, or assumed, that the systematic discrimination charged was in fact made; that the shares of the favored domestic corporations constituted a relatively material part of other moneyed capital employed in substantial competition with the business of the banks; and that the unequal exaction complained of violated the laws of Iowa. We have to consider only the legal effect under the federal law of this wrongful administration of the state law. There is no challenge of the validity of any state statute.

The taxes exacted from the petitioners were laid under Iowa Code, § 1322-1a, Supplement 1913. That section imposes upon "state, savings and national bank stock and loan and trust company stock and moneyed capital," an *ad valorem* tax based upon twenty per cent of the actual value thereof, computed at the same rate at which tangible property is taxed under the consolidated levy for local, county and state purposes. Compare *First National Bank* v. *Anderson*, 269 U. S. 341, 343. For the years in question, this levy ranged from 137.8 mills to 164 mills—the equivalent of 27.5 mills to 32.8 mills on the actual value. By the terms of § 1322-1a, taxes on the same basis should also have been laid upon shares of competing domestic corporations and upon other moneyed capital coming similarly into competition with both the national and the state banks. But the taxes laid upon shares of such competing domestic corporations were, in fact, at the rate of only 5 mills on the actual value. This discrimination occurred because to them was applied, not § 1322-1a, but § 1310, Supplement 1913. The latter section prescribes a tax of 5 mills on the dollar upon the full value of "moneys, credits and corporation shares of stock, except as otherwise provided, . . . and notes, including those secured by mortgage, . . ."[1] Thus the taxes

[1]Section 1310 expressly excepts from its operation "all moneyed capital within the meaning of section fifty-two hundred nineteen of the Revised Statutes of the United States," and provides that such capital "shall be listed and assessed . . . at the same rate as state, savings, national bank and loan and trust company stock is taxed . . . , and at the actual value of the moneyed capital so invested."

laid upon the shares of the competing domestic corporations were at a rate only one-fifth to one-seventh of that applied to the shares of the petitioners.

The wrongful discrimination so effected was not attributable to any act of the assessing body.[2] The shares in such competing domestic corporations had, in each year, been properly classified by the assessor in compliance with § 1322-1a; but the county auditor, in making up the tax list subsequently, changed these assessments and wrongfully extended them upon the books as "moneys and credits" subject to the 5 mill levy. In this form the tax was certified by the auditor to the county treasurer for collection; and the treasurer exacted taxes in accordance with the auditor's certification.

The Supreme Court of Iowa, having found or assumed that there was systematic discrimination, as charged, in favor of shares in the competing domestic corporations, denied relief because it held that the auditor's acts in disregarding assessments properly made were a usurpation of power and a nullity; that the county treasurer was not bound to accept the auditor's unauthorized certification; and that his exaction of the taxes in accordance therewith was, therefore, also unauthorized.[3] The Court de-

[2]Other competing moneyed capital in the form of investments held by individuals and by a few foreign corporations was wrongfully classified by the assessor as "moneys and credits", and so returned upon the assessment rolls to the county auditor, who extended the assessments upon the tax books accordingly, and applied to them the 5 mill levy. The Supreme Court of Iowa held that the right to complain of this discrimination had been lost by failure to avail of the method of review prescribed by the State. We have no occasion to consider this matter, as we hold that the more favorable taxation of the competing domestic corporations entitles the petitioners to the relief sought.

[3]The Iowa court describes (232 N. W. at p. 451) the functions of the several taxing officers: "The assessment is made in the first instance by the local assessor, who lists and classifies the property and makes valuations. He then lays the assessment rolls before the local board of review. The local board of review adjusts the assessments, 'in such manner as to secure the listing of property at its actual value and the assessment of property at its taxable value' and adds 'to the assessment rolls any taxable property not included therein . . . as the assessor should have done'. Code Supp. 1913, Sections 1360, 1370. When the corrections have been made, the assessor makes up the assessor's book and returns it to the county auditor together with the assessment rolls. *Id.* Section 1366. The county board of review equalizes class valuations between political subdivisions of the county, and the state board of

clared that, since the wrongful exaction was made without authority from the State, it did not constitute discrimination by the State; declared that, since neither the auditor nor the treasurer had power to discharge a legally assessed tax, the competing domestic corporations remain, so far as appears, liable for the balance of the assessments; and held that the petitioners had no other remedy than to await action by the taxing authorities to collect the taxes remaining due from their competitors or to initiate proceedings themselves to compel such collection. In other words, it held that no right of petitioners under the state law was violated, because they were not overassessed; that no right under the federal law was violated, because the lower taxation of their competitors due to usurpation by officials was not an act of the State; and that the discrimination thus effected was remediable only by correcting the wrong under the state law in favor of the competitors and not "by extending . . . the benefits as of a similar wrong" to the petitioners. The decision rests upon a misconception of the scope and effect of the federal rights involved.

First. The Iowa-Des Moines National Bank is an instrumentality of the United States, and but for § 5219 the State would be without power to tax its shares. *First National Bank* v. *Anderson*, 269 U. S. 341, 347. That section permits a State to tax national bank shareholders if, and only so far as, the taxation is not at a rate greater "than is assessed upon other moneyed capital in the hands of individual citizens of such State". The limits of this permission were transgressed when the treasurer exacted from this petitioner taxes at rates greater than those applied in exacting payment from the competing domestic corporations. *Supervisors* v. *Stanley*,

---

review equalizes between the counties. *Id.* Code 1897, Sections 1375, 1379. The classification and assessment by the assessor, as approved by the board of review, determines the levy or rate to be applied. . . The assessments and the rate to be paid by the several taxpayers as between themselves are complete and are determined when the assessor returns the assessment rolls and assessment book to the county auditor, subject to class modification by the county and state boards of review and to change by the court if appeal has been taken. The remainder of the process of taxation is one of collection and enforcement of the taxes as so assessed. This is ministerial. The auditor's duty is to transcribe the assessments into the tax book and make the necessary computations and extensions and clerical corrections. This duty is merely clerical and ministerial."

105 U. S. 305, 318; *Stanley* v. *Supervisors of Albany*, 121 U. S. 535, 550, 551. Compare *First National Bank of Hartford* v. *Hartford*, 273 U. S. 548, 560. The discrimination was none the less action by the State although the auditor and the treasurer, in failing to give equal treatment, acted without authority and contrary to the law of the State. "It is a question of the power of the State as a whole;"[4] and for the purpose of determining whether the limitations imposed by § 5219 have been observed, the powers of the several state officials must be treated as if merged in a single officer. The condition imposed by the federal law was not satisfied by the enactment by the State of appropriate legislation for the taxation of other moneyed capital, and the commitment to subordinate officers of the duty of determining what constitutes such capital. The responsibility of the State for the propriety of that determination remained. Moreover, since the State now insists upon retaining the higher tax exacted from the national bank, and is sustained in so doing by its highest court, the discriminatory action cannot be said to be the act of the individual officials. *Montana National Bank* v. *Yellowstone County*, 276 U. S. 499, 504, 505.

Second. Both petitioners claim that they have been subjected to intentional, systematic discrimination in violation of the equal protection clause of the Fourteenth Amendment. The federal right of the Central State Bank rests wholly upon that clause. It is assumed that there was such inequality of treatment as the Constitution prohibits. *Raymond* v. *Chicago Union Traction Co.*, 207 U. S. 20, 37; *Sioux City Bridge Co.* v. *Dakota County*, 260 U. S. 441, 446; *Cumberland Coal Co.* v. *Board of Revision*, Nos. 7-13, October Term, 1931, decided November 23, 1931. Compare *Sunday Lake Iron Co.* v. *Wakefield*, 247 U. S. 350, 353. But the Iowa court, without denying the lack of power of the State to authorize the discrimination effected, holds that such discrimination does not violate the federal Constitution because it resulted from the act of private individuals and not of the State. The prohibition of the Fourteenth Amendment, it is true, has reference exclusively to action by the State, as distinguished from action by private individuals. *Virginia* v. *Rives*, 100 U. S. 313, 318; *United States* v.

[4] *Rippey* v. *Texas*, 193 U. S. 504, 509, citing *Missouri* v. *Dockery*, 191 U. S. 165, 171. Compare *Coulter* v. *Louisville & Nashville R. R. Co.*, 196 U. S. 599, 609; *Hayman* v. *City of Galveston*, 273 U. S. 414, 416.

Harris, 106 U. S. 629, 639. But acts done "by virtue of a public position under a State Government . . . and in the name and for the State", *Ex parte Virginia*, 100 U. S. 339, 347, are not to be treated as if they were the acts of private individuals, although in doing them the official acted contrary to an express command of the state law. When a state official, acting under color of state authority, invades, in the course of his duties, a private right secured by the federal Constitution, that right is violated, even if the state officer not only exceeded his authority but disregarded special commands of the state law.[5] Here, the exaction complained of was made by the treasurer in the name of and for the State, in the course of performing his regular duties; the money is retained by the State; and the judicial power of the State has been exerted in justifying the retention. Compare *Montana National Bank* v. *Yellowstone County, supra; Carpenter* v. *Shaw*, 280 U. S. 363, 369.

Respondents rely upon *Barney* v. *City of New York*, 193 U. S. 430, 438. The question there decided was that the lower federal court had properly dismissed a bill in equity since it appeared upon its face that the act complained of was forbidden by the state legislation. We have no occasion to discuss that case.[6] Here the petitioners sued in a state court. Some expressions in the opinion in the *Barney* case, said to be inconsistent with the conclusions stated above, have been disapproved by this Court. *Home Telephone & Telegraph Co.* v. *City of Los Angeles*, 227 U. S. 278, 294.

Third: The fact that the State may still have power to equalize the treatment of the petitioners and the competing domestic cor-

[5]Neal *v.* Delaware, 103 U. S. 370, 397; Yick Wo *v.* Hopkins, 118 U. S. 356, 373, 374; Home Telephone & Telegraph Co. *v.* City of Los Angeles, 227 U. S. 278, 287, 288; Cuyahoga Power Co. *v.* Akron, 240 U. S. 462, 464. Compare Raymond *v.* Chicago Union Traction Co., *supra;* Greene *v.* Louisville & Interurban R. R. Co., 244 U. S. 499, 507, 508; Fidelity & Deposit Co. *v.* Tafoya, 270 U. S. 426, 434; Hopkins *v.* Southern California Telephone Co., 275 U. S. 393, 398. See also Chicago Great Western Ry. Co. *v.* Kendall, 266 U. S. 94, 98. Cases discussing the question of what constitutes a suit against the State within the meaning of the Eleventh Amendment, such as Ex parte Young, 209 U. S. 123; Western Union Telegraph Co. *v.* Andrews, 216 U. S. 165; Looney *v.* Crane Co., 245 U. S. 178; Public Service Co. *v.* Corboy, 250 U. S. 153, have no bearing upon the power of this Court to protect rights secured by the federal Constitution.

[6]See Samuel Shepp Isseks, "Jurisdiction of the Lower Federal Courts to Enjoin Unauthorized Action of State Officials", 40 Harv. L. Rev. 969.

porations by compelling the latter to pay hereafter the unpaid balance of the amounts assessed against them in 1919, 1920, 1921 and 1922 is not material. The petitioners' rights were violated, and the causes of action arose, when taxes at the lower rate were collected from their competitors. It may be assumed that all ground for a claim for refund would have fallen if the State, promptly upon discovery of the discrimination, had removed it by collecting the additional taxes from the favored competitors. By such collection the petitioners' grievances would have been redressed; for these are not primarily overassessment. The right invoked is that to equal treatment; and such treatment will be attained if either their competitors' taxes are increased or their own reduced. But it is well settled that a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law, cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid. *Cumberland Coal Co.* v. *Board of Revision, supra; Greene* v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499, 514-518; *Chicago Great Western Ry. Co.* v. *Kendall*, 266 U. S. 94, 98; *Sioux City Bridge Co.* v. *Dakota County, supra.* Nor may he be remitted to the necessity of awaiting such action by the state officials upon their own initiative. *Montana National Bank* v. *Yellowstone County, supra.*

The petitioners are entitled to obtain in these suits refund of the excess of taxes exacted from them.

Reversed.

Clerk, Supreme Court, U. S.

A true copy.

Test: